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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

20 LANCE AARON WILSON;  
 21 MAURICE SMITH; EDGAR  
 VASQUEZ, individually and on behalf  
 22 of all others similarly situated,

Plaintiff-Petitioners,

vs.

24 FELICIA L. PONCE, in her capacity as  
 25 Warden of Terminal Island; and  
 MICHAEL CARVAJAL, in his  
 26 capacity as Director of the Bureau of  
 Prisons,

Defendant-Respondents.

CASE NO. 2:20-cv-04451-DDP-MRW

**PLAINTIFF-PETITIONERS’  
 NOTICE OF *EX PARTE*  
 APPLICATION AND *EX PARTE*  
 APPLICATION FOR TEMPORARY  
 RESTRAINING ORDER AND  
 ORDER TO SHOW CAUSE RE:  
 PRELIMINARY INJUNCTION;  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES**

*[Filed Concurrently with Declaration of  
 Naeun Rim; Declaration of Jimmy  
 Threatt; and Proposed Order]*

Assigned to Hon. Dean D. Pregerson  
 Courtroom 9C

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that Plaintiff-Petitioners (“Petitioners”) Lance  
3 Aaron Wilson, Maurice Smith, Edgar Vasquez, individually and on behalf of all  
4 others similarly situated, apply, *ex parte*, for a temporary restraining order (“TRO”) and an order to show cause (“OSC”) re preliminary injunction against Defendant-  
5 Respondents (“Respondents”) Felicia L. Ponce, in her official capacity as Warden of  
6 Terminal Island, and Michael Carvajal, in his official capacity as Director of the  
7 Bureau of Prisons, enjoining Respondents from continuing to violate Petitioners’  
8 rights under the Eight Amendment to the United States Constitution to be free from  
9 cruel and unusual punishment in relation to Respondents’ failed response to the  
10 COVID-19 crisis.

11  
12 Specifically, Petitioners request that the Court issue a TRO and an OSC re  
13 preliminary injunction in the form of the proposed order submitted concurrently  
14 with this *ex parte* application. This *ex parte* application is made pursuant to 17  
15 U.S.C. § 502(a), Federal Rule of Civil Procedure 65, and Local Rule 65.

16 This *ex parte* application is based upon this Notice, the Memorandum of  
17 Points and Authorities, the Declaration of Naeun Rim, the declaration of Jimmy  
18 Threatt, all accompanying exhibits, the filings in this action, the Proposed Order,  
19 which is being lodged in accordance with Local Rule 7-20, and any and all  
20 evidence, argument, or other matters that may be presented at the hearing.

21 Although there is no requirement under the local rules for Petitioners to meet  
22 and confer with Respondents prior to seeking an *ex parte* application for a TRO and  
23 OSC re preliminary injunction, *see* Local Rule 7-3 (noting exception for meet-and-  
24 confer requirement on *ex parte* applications for TRO and OSC re preliminary  
25 injunction), on May 20, 2020, counsel for Petitioners Naeun Rim emailed the  
26 general email address for the Habeas Unit at the U.S. Attorney’s Office and  
27 corresponded with Assistant United States Attorney (“AUSA”) Joanne Osinoff over  
28 email to provide notice that Petitioners intended to file this *ex parte* application and

1 described its nature. (Declaration of Naeun Rim (“Rim Decl.”) ¶ 18.) On May 21,  
2 2020, Ms. Rim met and conferred with AUSA Osinoff and AUSA David M. Harris  
3 by telephone and provided further information about the nature of the relief  
4 requested. (Rim Decl. ¶ 18.) Petitioners anticipate Respondents will object.

5 *Local Rule 5-4.3.4(a)(2)(i) Compliance: Filer attests that all other*  
6 *signatories listed concur in the filing’s content and have authorized this filing.*

7 DATED: May 22, 2020

Respectfully submitted,

8 Terry W. Bird  
9 Dorothy Wolpert  
10 Naeun Rim  
11 Shoshana E. Bannett  
12 Christopher J. Lee  
13 Jimmy Threatt  
14 Bird, Marella, Boxer, Wolpert, Nessim,  
15 Dooks, Lincenberg & Rhow, P.C.

16 By:       /s/ Naeun Rim        
17 Naeun Rim  
18 Attorneys for Plaintiff-Petitioners

19 DATED: May 22, 2020

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21 Peter Bibring  
22 Attorneys for Plaintiff-Petitioners

23 DATED: May 22, 2020

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This case presents, quite literally, a matter of life or death. Each hour, the  
4 people imprisoned at Terminal Island, whether incarcerated for minor or major  
5 offenses, are facing the death penalty. Petitioner Lance Aaron Wilson sits in his cell  
6 at Terminal Island, the site of one the worst COVID-19 outbreaks at a correctional  
7 facility in the country, so close to his cellmate that he can reach his arm down to  
8 touch him. Mr. Wilson, whose asthma and hypertension make him especially  
9 vulnerable to COVID-19, recently tested positive for the virus. He is suffering from  
10 body chills, severe migraines and frequent sweating. No doctor has examined Mr.  
11 Wilson, and he has not been provided with any treatment – not even acetaminophen  
12 to reduce his fever. He knows that eight of his fellow prisoners have already died  
13 due to complications from COVID-19, and many more are in the hospital. He feels  
14 that he “has been abandoned and left to die.”

15 Employees of Terminal Island feel abandoned too. They tell reporters under  
16 conditions of anonymity that they are afraid to go to work every day and are scared  
17 that they will test positive. Back in mid-March, when they asked for personal  
18 protective equipment, Respondents refused, saying that it “could scare the inmates.”  
19 Like Mr. Wilson, Terminal Island staff know there will be more deaths.<sup>1</sup>

20 There is good reason that prisoners and staff alike are fearful of the conditions  
21 at Terminal Island. Terminal Island is currently engulfed by COVID-19. So far, 699  
22 of 1,042 prisoners and 16 staff members have tested positive for COVID-19. While  
23 COVID-19 poses a threat to all prisons, it is especially dangerous at Terminal Island  
24 because it specializes in housing prisoners who need long-term medical or mental  
25 health care. Many Terminal Island prisoners are medically vulnerable and have a  
26

27 <sup>1</sup> [https://losangeles.cbslocal.com/2020/04/29/coronavirus-goldstein-investigates-](https://losangeles.cbslocal.com/2020/04/29/coronavirus-goldstein-investigates-terminal-island-federal-prison/)  
28 [terminal-island-federal-prison/](https://losangeles.cbslocal.com/2020/04/29/coronavirus-goldstein-investigates-terminal-island-federal-prison/)

1 heightened risk of serious illness or death from COVID-19. The prison is  
2 overcrowded and overwhelmed, unwilling to protect its COVID-19-negative  
3 prisoners, unable to adequately treat its COVID-19 patients, and incapable of  
4 providing care for its many prisoners with critical non-virus medical needs.  
5 Respondents' indifference towards prisoners ultimately translates into indifference  
6 towards public safety—prisoners who get too sick to be cared for in Terminal  
7 Island's facilities have to be moved to community hospitals, where they come into  
8 contact with the general population.<sup>2</sup>

9       What are Respondents doing in the face of this catastrophe? Their decision to  
10 re-categorize hundreds of people as “recovered” and shuffle them around from one  
11 room to another is nothing more than rearranging deck chairs on the Titanic. No  
12 matter how you look at it, in a span of 8 weeks, more than 700 people incarcerated  
13 or working at Terminal Island became infected with the coronavirus. As one District  
14 Court judge put it, BOP is unable “to explain how FCI Terminal Island is ensuring  
15 the safety and health of its inmates given the exponential growth in cases over such  
16 a short period of time.” *USA v. Fishman*, No. 16-cr-00246-HSG-1, 2020 WL  
17 2097615, at \* 2 (May 1, 2020). The number of infected people is so high that it will  
18 be impossible for Respondents to provide Petitioners with adequate medical care,  
19 and as evident from individualized accounts, Respondents are already failing to  
20 adequately monitor and treat those who are ill.

21       Respondents are refusing to implement the obvious solution that would both  
22 prevent even more infection and reduce the strain on medical resources: using the  
23 authority Congress provided them under the Coronavirus Aid, Relief, and Economic  
24 Security Act (“CARES Act”) to release more prisoners into home confinement.  
25 Experts confirm that it is impossible for Respondents to make Terminal Island  
26 compliant with CDC guidelines *without significantly reducing the prisoner*

27 \_\_\_\_\_  
28 <sup>2</sup> Rim Decl. Exh. K (Declaration of Samsheer Samra, M.D.) ¶¶ 22-24.

1 *population*. But Respondents have virtually ignored the directive of Attorney  
2 General William Barr, who issued a memo on April 3, 2020, that urged the BOP to  
3 “immediately maximize appropriate transfers to home confinement of all  
4 appropriate inmates” at facilities like Terminal Island, including “*all at-risk*  
5 *inmates—not only those who were previously eligible for transfer.*”<sup>3</sup> . Out of the  
6 1,000+ prisoners at Terminal Island, only 46 are even being considered for  
7 placement on home confinement, and only 5 have been released. Respondents are in  
8 denial—and their denial is killing people. *More Terminal Island prisoners have*  
9 *died from coronavirus than have been granted release to home confinement.*

10 Immediate judicial relief is necessary to ensure that more lives are not lost.  
11 Congress gave Respondents the ability to act humanely and constitutionally, and  
12 Respondents have refused. Thus, Court intervention is necessary. Petitioners Lance  
13 Aaron Wilson, Maurice Smith, and Edgar Vasquez, individually and on behalf of all  
14 others similarly situated, move for a Temporary Restraining Order and ask that this  
15 Court put in place a structured, court-supervised process for immediate,  
16 individualized consideration of each prisoner’s suitability for release on an  
17 accelerated schedule that is more focused on the critical factors of prisoner and  
18 public safety than the current home confinement review process at Terminal Island.  
19 Petitioners are asking that the Court institute this process with the goal of releasing a  
20 sufficient number of prisoners to allow for physical distancing, quarantine, and  
21 isolation in accordance with CDC guidelines for those who remain at Terminal  
22 Island, and to provide the minimally adequate medical care required by the Eighth  
23 Amendment.

24  
25  
26 <sup>3</sup> Rim Decl. Exh. A (Memorandum For Director of Bureau of Prisons re Increasing  
27 Use of Home Confinement at Institutions Most Affected by COVID-19, Office of  
28 the Attorney General, Washington, D.C. (Apr. 3, 2020)) at 1-2 (emphasis added.)

1 **II. FACTUAL BACKGROUND**

2 **A. There is a Dangerous and Uncontrolled COVID-19 Outbreak at**  
 3 **Terminal Island.**

4 Terminal Island is a low-security correctional institution within the BOP that  
 5 focuses on housing prisoners who need long-term medical or mental health care.<sup>4</sup> In  
 6 other words, Terminal Island is home to some of the most vulnerable, but least  
 7 dangerous people in the federal prison system. Terminal Island is currently home to  
 8 1,042 of these prisoners,<sup>5</sup> which is tragically at least eight fewer than when the  
 9 COVID-19 public health crisis began. Months after the start of the coronavirus  
 10 public health crisis, deep into this era of social distancing, Terminal Island remains  
 11 severely overcrowded. It has a designed capacity of just 779, which means that it is  
 12 operating under an overcrowding rate of 133%.<sup>6</sup>

13 It is clear from the public record that Respondents will not act to meet the  
 14 bare minimum requirements of the Constitution unless forced to do so. On March  
 15 21, 2020, only two months ago, BOP reported the first case of a prisoner testing  
 16 positive for COVID-19. Although public health officials warned that BOP was  
 17 walking into a “disaster waiting to happen[,]” BOP claimed that it was “confident”  
 18 in its “robust efforts to keep correctional workers and the inmate population safe  
 19 and healthy[.]”<sup>7</sup> A little over a month later, BOP’s own statistics show that this  
 20 confidence was fatally misplaced. The outbreak on Terminal Island quickly became,

21 \_\_\_\_\_  
 22 <sup>4</sup> <https://lbpost.com/news/terminal-island-inmate-dies-7th-700>

23 <sup>5</sup> <https://www.bop.gov/locations/institutions/trm/>

24 <sup>6</sup> Federal Bureau of Prisons, *Prison Rape Elimination Act (PREA) Audit*  
 25 *Report*, 2, 6 (May 29, 2019), available at  
 26 [https://www.bop.gov/locations/institutions/trm/prea\\_trm.pdf](https://www.bop.gov/locations/institutions/trm/prea_trm.pdf)

27 <sup>7</sup> [https://www.washingtonpost.com/national/disaster-waiting-to-happen-thousands-of-inmates-released-as-jails-face-coronavirus-threat/2020/03/24/761c2d84-6b8c-11ea-b313-df458622c2cc\\_story.html](https://www.washingtonpost.com/national/disaster-waiting-to-happen-thousands-of-inmates-released-as-jails-face-coronavirus-threat/2020/03/24/761c2d84-6b8c-11ea-b313-df458622c2cc_story.html)

1 what was at one point, the worst outbreak of COVID-19 in the country. Terminal  
2 Island's outbreak started with a single staff member, and spread like wildfire.<sup>8</sup> On  
3 April 16, 2020, Terminal Island had 33 confirmed cases. Within two weeks, that  
4 number climbed by over 1700%, and Terminal Island reported 570 confirmed cases.  
5 By early May, Terminal Island reported 693 confirmed cases, which meant that  
6 shockingly, the disease had spread to nearly 70% of the prison.

7 In the wake of this alarming report, the media descended on Terminal Island.  
8 As United States Senators and Congressional representatives demanded answers,<sup>9</sup>  
9 Terminal Island's official reported numbers took a sudden and precipitous turn, with  
10 Terminal Island claiming that many of their prisoners were now "recovered."  
11 Terminal Island currently reports that 121 prisoners and 8 staff are positive for  
12 COVID 19 and 570 prisoners and 10 staff have "recovered."<sup>10</sup> It is not clear how  
13 BOP is making determinations that prisoners have recovered or how they are  
14 housing these so-called recovered patients, but according to doctors it is important  
15

16 <sup>8</sup> Goldstein Investigates: Coronavirus Cases At Terminal Island Federal Prison  
17 Increase 900% in a Week (April 29, 2020), *available at*  
18 <https://losangeles.cbslocal.com/2020/04/29/coronavirus-goldstein-investigates-terminal-island-federal-prison/>

19 <sup>9</sup> Harris, Feinstein to Bureau of Prisons: Stop Spread of Coronovirus at Terminal  
20 Island (April 30, 2020), *available at* <https://www.harris.senate.gov/news/press-releases/harris-feinstein-to-bureau-of-prisons-stop-spread-of-coronavirus-at-terminal-island->  
21 [terminal-island](https://www.harris.senate.gov/news/press-releases/harris-feinstein-to-bureau-of-prisons-stop-spread-of-coronavirus-at-terminal-island-) -; Reps. Lieu, Barragan Urge Release, Home Confinement of  
22 Federal Prisoners in COVID-19-Struck San Pedro Facility (May 5, 2020), *available*  
23 *at* <https://lieu.house.gov/media-center/in-the-news/rebs-lieu-barragan-urge-release-home-confinement-federal-prisoners-covid-19>

24 <sup>10</sup> <https://www.bop.gov/coronavirus/>. One day earlier, BOP reported that 117  
25 prisoners had tested positive and 575 prisoners had recovered. It appears that at  
26 least 5 prisoners relapsed after they had been reported as recovered. There is also a  
27 one-prisoner discrepancy between these two counts, even though BOP's webpage  
28 for Terminal Island shows total the total number of prisoners as unchanged.



1 to continue to quarantine, monitor, and protect “recovered” prisoners.<sup>11</sup>

2       When accounting for both positive and “recovered” prisoners, as of May 21,  
3 2020, BOP reports that a total of 686 out of the 1,042 individuals incarcerated at  
4 Terminal Island have recently tested positive for coronavirus, more than in the entire  
5 California Department of Corrections and Rehabilitation system combined.<sup>12</sup> Eight  
6 prisoners have died already. Terminal Island has utterly failed to protect the  
7 prisoners in its care from COVID-19. Indeed, prisoners at Terminal Island continue  
8 to contract COVID-19 to this day, demonstrating that Respondents still have not  
9 instituted appropriate preventative measures.<sup>13</sup>

10       At this point in the COVID-19 pandemic, the substantial danger posed by  
11 COVID-19 is well-known. COVID-19 causes serious illness, with overall case  
12 fatality rates in the United States so far estimated at 5.8%.<sup>14</sup> Approximately 20% of  
13 those who are infected and develop symptoms require significant medical  
14 intervention.<sup>15</sup> The condition of patients who require hospitalization often  
15 deteriorates in rapid fashion. For instance, approximately 50% develop hypoxemia  
16 (severe oxygen shortage) by the eighth day.<sup>16</sup> Twenty-nine percent develop Acute  
17 Respiratory Distress Syndrome (“ARDS”). ARDS, lethal on its own, also causes

18 \_\_\_\_\_  
19 <sup>11</sup> See *e.g.* Rim Decl. Exh. K ¶ 15.

20 <sup>12</sup> See Federal Bureau of Prisons, COVID-19 Coronavirus,  
21 <https://www.bop.gov/coronavirus/> (last accessed May 21, 2020) (reporting 111  
22 positive and 575 “recovered” prisoners), *compare* California  
23 Department of Corrections and Rehabilitation, COVID-19 Preparedness,  
<https://www.cdcr.ca.gov/covid19/> (last accessed May 21, 2020).

24 <sup>13</sup> Rim Decl. Exh. P (Declaration of Kate L. Morris) ¶ 3.

25 <sup>14</sup> Rim Decl. Exh. K ¶ 6.

26 <sup>15</sup> *Id.*

27 <sup>16</sup> *Id.*

1 fatal complications such as blood clots, collapsed lung, infections and scarring of  
2 lung tissue.<sup>17</sup>

3 The effects of COVID-19 are especially serious for people who are most  
4 vulnerable, including people over the age of 50, and those of any age with  
5 underlying health conditions, including weakened immune systems, asthma,  
6 hypertension, diabetes, serious heart and lung disease.<sup>18</sup> Although individuals in  
7 these categories are most vulnerable, even younger and healthier people can suffer  
8 severe consequences.<sup>19</sup> For example, adults age 20-44 account for 20% of all  
9 hospitalizations and 12% of ICU admissions.<sup>20</sup> Even healthier people who contract  
10 COVID-19 are susceptible to severe strokes.<sup>21</sup> For some, the stroke is even the first

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13 <sup>17</sup> *Id.*

14 <sup>18</sup> While the CDC typically classifies only people 65 and older as vulnerable,  
15 incarcerated individuals tend to be in poorer health than those in the general  
16 population, justifying the use of an earlier cutoff in classifying people deemed  
17 vulnerable. Rim Decl. Exh. K ¶ 8. The CDC itself acknowledges that incarcerated  
18 individuals are in poorer health than the general population, even at a younger age.  
19 *See also* Rim Decl. Exh. C (Interim Guidance on Management of Coronavirus  
20 Disease 2019 (COVID-19) in Correctional and Detention Facilities) at 16 (“Note  
21 that incarcerated/detained populations have higher prevalence of infectious and  
22 chronic diseases and are in poorer health than the general population, even at  
23 younger ages.”) *See also* Report of the WHO-China Joint Mission on Coronavirus  
24 Disease 2019 (COVID-19), World Health Organization (Feb. 28, 2020), at 12,  
[https://www.who.int/docs/defaultsource/coronaviruse/whochina-joint-mission-on-  
covid-19-final-report.pdf](https://www.who.int/docs/defaultsource/coronaviruse/whochina-joint-mission-on-covid-19-final-report.pdf) (hereinafter “WHO-China Joint Mission Report”)  
25 (“Individuals at highest risk for severe disease and death include people aged over  
26 60 years and those with underlying conditions such as hypertension, diabetes,  
27 cardiovascular disease, chronic respiratory disease and cancer.”)

28 <sup>19</sup> Rim Decl. Exh. K ¶ 9.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

1 symptom of COVID-19.<sup>22</sup> In fact, preliminary evidence suggests COVID-19 may  
2 render lasting organ damage in even minimally symptomatic or completely  
3 asymptomatic patients.<sup>23</sup> Importantly, COVID-19 is a novel illness, and doctors and  
4 epidemiologists are continuing to learn about new symptoms and complications.

5 **B. Terminal Island Is Not Properly Testing, Treating, or Isolating the**  
6 **Named Petitioners.**

7 The named Petitioners face the aforementioned risks of serious illness, lasting  
8 organ damage and even death from COVID-19. Two out of three of the named  
9 petitioners, Mr. Wilson and Mr. Smith, are especially vulnerable. Petitioner Lance  
10 Aaron Wilson (“Petitioner Wilson” or “Mr. Wilson”) is 35 years old and suffers  
11 from hypertension and asthma, which makes him significantly more vulnerable to  
12 complications should he contract COVID-19. Indeed, the WHO-China Joint Mission  
13 Report provides that the mortality rate is 8.4% for those with hypertension, and  
14 8.0% for those with chronic respiratory disease.<sup>24</sup> On May 6, 2020, Mr. Wilson  
15 informed his family in a letter that he had tested positive for COVID-19 and was  
16 experiencing symptoms including migraines, body chills, and sweating in his sleep.  
17 Since then, he has not been given any treatment, nor has he been able to see a  
18 doctor. Mr. Wilson has tried to submit medical complaints to his case manager but  
19  
20

21 <sup>22</sup> Coronavirus May Pose a New Risk to Younger Patients: Strokes, New York  
22 Times (May 14, 2020), [https://www.nytimes.com/2020/05/14/health/coronavirus-](https://www.nytimes.com/2020/05/14/health/coronavirus-strokes.html)  
[strokes.html](https://www.nytimes.com/2020/05/14/health/coronavirus-strokes.html)

23 <sup>23</sup> *Id.* (describing the way that COVID-19 can severely damage lung tissues, which  
24 in some case can cause a permanent loss of respiratory capacity, and target the heart  
25 muscle causing a condition known as myocarditis, or inflammation of the heart  
26 muscle, which can lead to rapid or abnormal heart rhythms in the short term and  
long-term heart failure that limits exercise tolerance and the ability to work.)

27 <sup>24</sup> *See* WHO China Joint Mission Report at 12.  
28

1 has received no response. Mr. Wilson feels that he is being “left to die.”<sup>25</sup>

2       Petitioner Maurice Smith (“Petitioner Smith” or “Mr. Smith”) is 50 years old  
3 and suffers from asthma, hypertension, and is also pre-diabetic. As a result of these  
4 conditions, Mr. Smith is at an elevated risk of serious illness and mortality from  
5 COVID-19.<sup>26</sup> After the COVID-19 outbreak began at Terminal Island, Mr. Smith  
6 was transferred to a makeshift living space in a warehouse, infested with vermin and  
7 without potable water, hot water for showers, or heating, where he lived with sick  
8 patients. Because prison officials refused to help anyone with a fever of under 101  
9 degrees no matter how sick they feel, Mr. Smith has tried to help the sick prisoners.  
10 While Mr. Smith has been tested for COVID-19, he has never been informed  
11 whether he is negative or positive. He has experienced symptoms, including body  
12 aches, severe fatigue, chills, and dizziness.<sup>27</sup>

13       Petitioner Edgar Vasquez (“Petitioner Vasquez” or “Mr. Vasquez”) is an  
14 incarcerated person at Terminal Island. He is 32 years old. Mr. Vasquez was  
15 transferred to the warehouse about the same time as Petitioner Smith. Due to the  
16 unsanitary conditions, he started feeling sick and became afraid that he had  
17 contracted COVID-19. Despite numerous requests when he was feeling ill, Mr.  
18 Vasquez was not tested or offered treatment for COVID-19 at that time. Whenever  
19 he did ask for treatment, he was simply told to “hang in there” because his  
20 temperature wasn’t high enough. It is unclear whether Mr. Vasquez had COVID-19  
21 at that time. But Mr. Vasquez later tested negative for COVID-19. He is now housed  
22 in an open plan dorm with 40 other prisoners sleeping just two feet apart from each  
23 other. People in that dorm have subsequently tested positive, meaning that, even  
24

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26 <sup>25</sup> Rim Decl. Exh. G (Declaration of Jacque Wilson) ¶ 22.

27 <sup>26</sup> The mortality rate for diabetes is 9.2%. *Id.*

28 <sup>27</sup> Declaration of Jimmy Threatt (“Threatt Decl.”) ¶ 4.

1 now, the isolation and quarantine procedures are inadequate to identify those who  
2 have been exposed to COVID-19.

3 **C. Terminal Island Refuses to Implement Essential Measures to**  
4 **Protect Prisoners and Mitigate the Spread of COVID-19**

5 **1. Rather Than Using Their Power to Release At-Risk**  
6 **Prisoners and Reduce Overcrowding, Respondents Moved**  
7 **People Into More Crowded, Rodent-Infested Spaces**

8 Beginning as early as March 12, 2020, California Governor Gavin Newsom  
9 informed the public that physical distancing was critical to prevent the spread of  
10 COVID-19 and instructed people to remain six feet apart from one another.<sup>28</sup> But  
11 the Governor’s recommendation fell on deaf ears at Terminal Island. As stated  
12 above, Terminal Island was severely overcrowded at the start of the coronavirus  
13 pandemic and remains so today, with an overcrowding rate of more than 133%.  
14 Unsurprisingly, given the level of overcrowding, prisoners at Terminal Island have  
15 not been able to maintain six-feet of physical difference. Many prisoners reside in  
16 open plan dorms with as many as 60 other prisoners in the same room, assigned to  
17 bunkbeds that are not separated by walls, with four or fewer feet between the  
18 bunks.<sup>29</sup> The 60 prisoners in these dorms share four toilets, four sinks and three  
19 showers.<sup>30</sup> Even in units where prisoners lived in two-person cells, they shared  
20 bathrooms with everyone on their floor – as many as 50 people sharing four urinals,  
21

22 <sup>28</sup> Bostock, Bill, “California Banned Gatherings of 250 or More and Said Smaller  
23 Ones Should Only Happen if People Stand Six Feet Apart,” Business Insider (March  
24 12, 2020), available at <https://www.businessinsider.com/california-bans-gatherings-250-prevent-coronavirus-six-foot-spacing-rule-2020-3>

25 <sup>29</sup> Threatt Decl. ¶ 5; Rim Decl. Exh. T (Declaration of Carlos Zuniga) ¶ 4; Rim  
26 Decl. Exh. I (Declaration of Jackeline Vasquez) ¶ 7.

27 <sup>30</sup> Rim Decl. Exh. H (Declaration of Jennifer Van Atta) ¶ 5.  
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1 four showers and four sinks.<sup>31</sup>

2 As the Terminal Island outbreak grew worse, prisoners were told that they  
3 would be moved to promote social distancing.<sup>32</sup> Instead, officials crammed  
4 medically-vulnerable inmates into an old warehouse where the beds were even  
5 closer together than their previous crowded housing.<sup>33</sup> Worse yet, even though  
6 proper sanitation and hygiene are important tools to fight the spread of COVID-19,<sup>34</sup>  
7 the warehouse is appallingly unsanitary. Numerous prisoners confirm that the  
8 warehouse is overrun with rodents, raccoons, and possums.<sup>35</sup> Prisoners sleep on  
9 fold-out lawn beds just three feet above these skittering animals while pigeons and  
10 bat circle overhead and defecate throughout the room.<sup>36</sup> The warehouse lacks  
11 potable water, hot water for showers, and heating. Petitioner Smith is so cold that he  
12 shivers all night, unable to sleep.<sup>37</sup> After a recent tour of Terminal Island,  
13 Congresswoman Barragan compared these makeshift facilities to the notorious  
14

15 \_\_\_\_\_  
16 <sup>31</sup> Rim Decl. Exh. G ¶ 7 (explaining that one of these urinals was broken, leaving  
17 only three urinals to be shared by 50 men).

18 <sup>32</sup> Rim Decl. Exh. B (Letters from Plaintiff-Petitioner Maurice Smith to his Wife  
19 Jennifer Van Atta (dated April 14, 2020))

20 <sup>33</sup> *Id.*

21 <sup>34</sup> “How to Protect Yourself & Others,” *available at*  
22 <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>

23 <sup>35</sup> Rim Decl. Exh. H ¶ 6; Rim Decl. Exh. I ¶ 5; Goldstein Investigates: Terminal  
24 Island Inmate Families Protest Prison Conditions After 5 Die From Coronavirus,  
25 *available at* <https://losangeles.cbslocal.com/2020/05/01/goldstein-investigates-terminal-island-inmate-families-protest-prison-conditions-after-5-die-from-coronavirus/>

26 <sup>36</sup> Rim Decl. Exh. H ¶ 6.

27 <sup>37</sup> Rim Decl. Exh. H ¶ 6.

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1 detention centers at the U.S.-Mexico border.<sup>38</sup> It is hard to imagine conditions more  
2 conducive to the spread of the virus than a crowded, unsanitary warehouse full of  
3 medically vulnerable individuals.

4 And, even now, after nearly 70% of Terminal Island prisoners have tested  
5 positive, and eight prisoners have died, Respondents are not providing prisoners  
6 who have tested negative with housing that allows for adequate physical distancing.  
7 Instead, medically vulnerable prisoners who tested negative, like William Sutton,  
8 are living and sleeping in open plan dormitories only two feet apart from other  
9 prisoners.<sup>39</sup> Moreover, prisoners are forced to wait in lines to pick up medication  
10 and are not able to practice physical distancing while in line.<sup>40</sup> The only cleaning is  
11 that done by the prisoners themselves. Respondents only provide watered-down  
12 disinfectant once a week, which frequently runs out, and no paper towels.<sup>41</sup> In such  
13 close, unsanitary quarters, with a medically vulnerable population, it is indisputable  
14 that prisoners will continue to fall ill on a daily basis. Once they become ill it goes  
15 without saying that they must be provided treatment.

## 16 **2. Respondents Ignored CDC-Issued Guidance for Managing** 17 **the Virus in Correctional Facilities.**

18 Early on, the Center for Disease Control recognized that correctional facilities  
19 like Terminal Island are incubators and amplifiers for an infectious disease like  
20 COVID-19.<sup>42</sup> The virus is extremely contagious; its spreads from person-to-person

21 \_\_\_\_\_  
22 <sup>38</sup> Richardson, Brandon, “Terminal Island is Failing to Protect Inmates from  
23 COVID-19, Congresswoman Says After Tour; Long Beach Post (May 12, 2020),  
24 available at <https://lbpost.com/news/terminal-island-tour-covid-19-barragan>

25 <sup>39</sup> Threatt Decl. ¶ 5; Rim Decl. Exh. I ¶ 7.

26 <sup>40</sup> Rim Decl. Exh. G ¶ 11.

27 <sup>41</sup> Threatt Decl. ¶ 6.

28 <sup>42</sup> Rim Decl. Exh. C at 2 (“Correctional and detention facilities can include

1 through respiratory droplets emitted when coughing and sneezing, or even through  
2 heavy breathing activities, like yelling and singing.<sup>43</sup> It also spreads through contact  
3 with contaminated surfaces and objects, where the virus can survive up to three  
4 days.<sup>44</sup> Given that prisoners experience their daily lives in close quarters, have  
5 limited access to daily hygiene resources, and are in worse health overall than the  
6 general population, COVID-19 poses enhanced risks to prisoners.<sup>45</sup>

7 To address this enhanced risk, the federal government provided correctional  
8 institutions with guidance on how to address these challenges. On March 23, 2020,  
9 the Center for Disease Control and Prevention (“CDC”) issued “Interim Guidance  
10 on Management of Coronavirus Disease (COVID-19) in Correctional and Detention  
11 Facilities” (“Interim Guidance”), which describes measures necessary to prevent the  
12 spread of COVID-19 in correctional facilities.<sup>46</sup> These guidelines include:

13 diagnosing, isolating, and caring for those with COVID-19; implementing  
14 quarantine of prisoners or staff who have had close contact with positive cases;  
15 remediating spaces with known coronavirus contact; enacting stricter sanitation  
16 policies; providing personal protective equipment (“PPE”) to those who have tested  
17 positive and guards who interact with them; and implementing effective social

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20 custody, housing, education, recreation healthcare, food service and workplace  
21 components in a single physical setting. The integration of these components  
22 presents unique challenges for control of COVID-19 transmission among  
incarcerated/detained persons, staff, and visitors.”)

23 <sup>43</sup> Rim Decl. Exh. K ¶ 4.

24 <sup>44</sup> [https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-](https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces)  
25 [surfaces](https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces)

26 <sup>45</sup> Rim Decl. Exh. C at 2.

27 <sup>46</sup> Rim Decl. Exh. C.  
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1 distancing measures.<sup>47</sup> As the CDC explained, “[c]onsistent application of specific  
 2 preparation, prevention, and management measures can help reduce the risk of  
 3 transmission and severe disease from COVID-19.”<sup>48</sup>

4 But Respondents have failed and refused to consistently apply the CDC  
 5 guidance at Terminal Island. To the contrary, Respondents spurned the guidance and  
 6 profoundly and pervasively failed to protect the health and safety of the incarcerated  
 7 individuals in their care at Terminal Island. Respondents’ failure to follow CDC  
 8 guidance breaks down into four general categories: (1) Failure to adequately  
 9 implement social distancing measures; (2) Failure to implement necessary hygiene  
 10 measures and provide appropriate PPE; (3) Failure to adequately test, trace and  
 11 quarantine/isolate; and (4 ) Failure to provide adequate medical monitoring and  
 12 treatment. For each category, a chart below compares the relevant CDC guidance  
 13 with Respondents’ inadequate actions or improper inaction.

14 **1. Failure to adequately implement social/physical distancing measures:**

<b>CDC Guidance</b>	<b>Terminal Island’s Improper Response</b>
17 Social distancing “is a cornerstone of 18 reducing transmission of respiratory 19 diseases such as COVID-19. 20 Corrections facilities must 21 “[i]mplement social distancing 22 strategies to increase the physical space between incarcerated/detained persons (ideally 6 feet between all individuals, regardless of the presence of symptoms). <sup>49</sup>	17 Officials moved medically vulnerable 18 inmates into even more crowded, and 19 unsanitary spaces. Prisoners who have 20 tested negative are to this day housed 21 less than two feet apart in large dorms. 22 After a tour on May 12, Congresswoman Barragan said that the first thing she noticed upon entering the facility was the lack of social distancing. <sup>50</sup>

23 \_\_\_\_\_  
 24 <sup>47</sup> *Id.*

25 <sup>48</sup> Rim Decl. Exh. C at 2.

26 <sup>49</sup> Rim Decl. Exh. C at 11.

27 <sup>50</sup> <https://lbpost.com/news/terminal-island-tour-covid-19-barragan>  
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1 **2. Failure to implement necessary hygiene measures and provide**  
 2 **appropriate PPE**

CDC Guidance	Terminal Island Response
4 Prisoners should be provided with 5 “undiluted disinfectants,” which are 6 necessary to actually kill the virus on 7 surfaces <sup>51</sup>	Respondents provided prisoners with watered down solutions and dirty mops and rags to use to apply the useless disinfectant. <sup>52</sup> Because they are only provided with disinfectant once a week, prisoners frequently run out of cleaning solution and have nothing to clean with. <sup>53</sup> There is no professional cleaning of living areas or bathrooms. <sup>54</sup> All of the cleaning is done by prisoners with these inadequate cleaning supplies. Petitioner Vasquez has to clean the bathroom before he uses it because there are stick people that make a mess. <sup>55</sup> Petitioners simply do not have access to the cleaning supplies necessary to sanitize themselves, their personal items or their living areas.
14 Confirmed or suspected cases of 15 COVID-19 should wear face masks at 16 all times. Corrections institutions 17 should “[p]rovide clean masks as needed. Masks should be changed at least daily, and when visibly soiled or wet.” <sup>56</sup>	Prisoners were not given masks until approximately three weeks ago. Prisoners have been issued just two masks each, which are laundered only once a week. They are forced to reuse the dirty masks over and over again. <sup>57</sup>
18 Staff having direct contact with 19 confirmed or suspected cases must wear face masks and other PPE	Staff report that they were initially denied PPE and told that ‘it could scare

20 <sup>51</sup> Rim Decl. Exh. C at 9.

21 <sup>52</sup> Rim Decl. Exh. I ¶ 7.

22 <sup>53</sup> Threatt Decl. ¶ 6.

23 <sup>54</sup> *Id.*

24 <sup>55</sup> *Id.*

25 <sup>56</sup> Rim Decl. Exh. C at 15.

26 <sup>57</sup> Rim Decl. Exh. G ¶ 12; Threatt Decl. ¶ 4.

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	<p>the inmates.”<sup>58</sup> Unicorn, an entity that runs prisoner work programs at Terminal Island, did not begin distributing masks to prisoner workers and correctional officers until about April 2, 2020<sup>59</sup> Even now, guards only sometimes wear masks around sick inmates.<sup>60</sup> If a guard without a mask contracts the virus from a sick prisoner, he could spread COVID-19 by visiting units with healthy prisoners.</p>
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**3. Failure to adequately test, trace and quarantine/isolate**

**CDC Guidance**

**Terminal Island Response**

The CDC instructs prisons “not [to] cohort confirmed cases with suspected cases or contact cases.”<sup>61</sup>

Not only has Terminal Island failed to segregate confirmed cases from suspected cases, Terminal Island has even been mixing its healthy patients with its sick. There are not have enough beds for people who were suspected of or had tested positive for COVID so nurses commingled symptomatic prisoners with prisoners seeking medical treatment for unrelated problems in the prison’s short stay hospital units, Nurses also moved symptomatic patients from hospital beds to the general population to make room for someone sicker.<sup>62</sup>

Individuals who have had close contact with a COVID-19 case should be quarantined. ideally in a single cell. for

Petitioner Vasquez resides in a unit with other COVID-19 negative prisoners. If a prisoner is determined to have

<sup>58</sup> <https://losangeles.cbslocal.com/2020/05/01/goldstein-investigates-terminal-island-inmate-families-protest-prison-conditions-after-5-die-from-coronavirus/>

<sup>59</sup> Cary Aspinwall, Keri Blakinger, & Joseph Neff, *Federal Prison Factories Kept Running as Coronavirus Spread*, The Marshall Project (Apr. 10, 2020), <https://www.themarshallproject.org/2020/04/10/federal-prison-factories-kept-running-as-coronavirus-spread>.

<sup>60</sup> Rim Decl. Exh. G ¶ 12; Threatt Decl. ¶ 4.

<sup>61</sup> See Rim Decl. Exh. C at 15.

<sup>62</sup> Rim Decl. Exh. J (Declaration of Stephen Rines) ¶ 8.

1 14 days to determine whether they  
2 develop symptoms.<sup>63</sup> The quarantined  
3 individual should be monitored for  
4 symptoms two times per day for 14  
5 days.<sup>64</sup>

contracted the disease, he is removed  
from the unit, however there are no  
measures taken to assess whether other  
prisoners who have been in close  
contact with that prisoner have also  
contracted COVID-19. Moreover, two  
or three times a week, groups of as  
many as 10 to 20 people are moved in  
and out of J Unit, which contains  
COVID-19-negative prisoners.<sup>65</sup> Given  
Respondents' failure to follow CDC  
contact tracing recommendations, it is  
not surprising that Prisoner Takaharo  
Matsuba who tested negative, and is  
held in a "negative" warehouse dorm  
room with 50 to 60 other inmates,  
reports that nine inmates in the dorm  
tested positive on May 8.<sup>66</sup>

6 For prisoners who test positive for  
7 COVID-19, the CDC recommends that  
8 they be isolated. If the number of  
9 confirmed cases exceeds the number of  
10 individual medical isolation spaces in  
11 the facility, prisons need to be  
12 especially mindful of cases who are at  
13 higher risk of severe illness from  
14 COVID-19, who should ideally not be  
15 cohorted with other infected  
16 individuals, and if cohorting is  
17 unavoidable, should be allocated more  
18 space for higher risk individuals within  
19 a shared medical isolation space.<sup>67</sup>

Terminal Island's official written policy  
states that from April 13, 2020 to May  
18, 2020, inmates in isolation will be  
placed in a single cell. However,  
Prisoner Wilson tested positive during  
this time period and was suffering from  
symptoms but was not placed in a  
single-cell isolation unit. He shares his  
two-person cell with a bunkmate who is  
so close he can reach down and touch  
him, and he shares a bathroom with 50  
other prisoners. He also has to wait in  
line to pick up food and medication, and  
is unable to social distance there.<sup>68</sup>  
Petitioner Smith, who was held in a  
makeshift warehouse with many other  
inmates and was negative at the time,  
observed that sick prisoners with  
temperatures under 101 degrees are left

21 <sup>63</sup> See Rim Decl. Exh. C at 4.

22 <sup>64</sup> *Id.* at 11.

23 <sup>65</sup> Threatt decl. ¶ 5.

24 <sup>66</sup> Rim Decl. Exh. P ¶ 3.

25 <sup>67</sup> Rim Decl. Exh. C at 16, 19

26 <sup>68</sup> Rim Decl. Exh. G ¶¶ 8, 9

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in the unit and told to “hang in there.”

**4. Failure to provide adequate medical monitoring and treatment**

**CDC Guidance**

Facilities “should ensure that incarcerated individuals receive medical evaluation and treatment at the first sign of COVID-19 symptoms.”<sup>69</sup>

**Terminal Island Response**

Petitioner Wilson, who has pre-existing conditions that make him especially vulnerable, tested positive and was suffering from severe migraines, chills and profuse sweating, but was never seen by a doctor and has not been able to talk to any medical personnel about his symptoms, prognosis or treatment. He was never provided any treatment, not even an over the counter medication to reduce fever.<sup>70</sup>

During his time in a Terminal Island short stay hospital unit, former prisoner Stephen Rines was told by a prison nurse that one of the people she was treating had low blood oxygen levels and was suffering from labored breathing, but prison officials still waited for many hours before finally taking him to the hospital, against the nurse’s recommendation.<sup>71</sup>

Petitioner Vasquez observed that sick prisoners were unable to obtain medical attention until they were “literally on the floor dying.”<sup>72</sup> Other prisoners were told that they could not receive medical attention until they had a sustained temperature of more than 101 degrees.<sup>73</sup>

Patients with risk factors for severe illness should be monitored closely

Petitioner Wilson, who has two risk factors for severe illness. was not even

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<sup>69</sup> *Id.* at 23.

<sup>70</sup> Rim Decl. Exh. G ¶ 21.

<sup>71</sup> Rim Decl. Exh. J ¶ 10.

<sup>72</sup> Threatt Decl. ¶ 6.

<sup>73</sup> Threatt Decl. ¶ 4.

1 given the risk of progression to severe  
 2 illness in the second week after  
 3 symptom onset.<sup>74</sup> Importantly, if the  
 4 facility is not able to provide such  
 5 evaluation and treatment, the CDC's  
 6 guidance does not permit abdicating  
 7 these functions. Instead, the CDC  
 8 recommends that a plan should be in  
 9 place to safely transfer the prisoner to  
 10 another facility or local hospital.<sup>75</sup>

been able to talk to a doctor. Nobody is  
 monitoring his status.<sup>76</sup> According to  
 Petitioner Smith, no one checked  
 temperatures until after the first inmate  
 died; now they check temperatures  
 twice a day but not inquire as to  
 symptoms.<sup>77</sup>

Without adequate medical attention,  
 some prisoners have become gravely ill  
 and died.

7  
 8 Respondents have also ignored CDC guidance aimed at promoting mental  
 9 health during a stressful period in prisoner's lives. Specifically, the CDC also  
 10 recommended that correctional facilities "consider increasing incarcerated/detained  
 11 persons' telephone privileges to promote mental health and reduce exposure from  
 12 direct contact with community visitors."<sup>78</sup> Instead of increasing telephone  
 13 privileges, Terminal Island eliminated it.<sup>79</sup> Terminal Island also prohibited using  
 14 computers and email. When inmates were sick and scared, they were unable to reach  
 15 out and speak to a loved one and instead faced the stress of a public health crisis on  
 16 their own.<sup>80</sup> This puzzling decision stands in stark contrast to the actions of the  
 17 California state prison system, which has instead partnered with a telephone  
 18 provider to offer incarcerated people periods of *free phone unlimited calls* during

19 \_\_\_\_\_  
 20 <sup>74</sup> Rim Decl. Exh. C at 23.

21 <sup>75</sup> *See id.*

22 <sup>76</sup> Rim Decl. Exh. G ¶¶ 3, 20, 21.

23 <sup>77</sup> Threatt Decl. ¶ 4.

24 <sup>78</sup> Rim Decl. Exh. C at 13.

25 <sup>79</sup> [https://www.cbsnews.com/news/coronavirus-no-phone-email-inmates-federal-  
 26 prisons-california-lompoc-terminal-island/](https://www.cbsnews.com/news/coronavirus-no-phone-email-inmates-federal-prisons-california-lompoc-terminal-island/)

27 <sup>80</sup> Rim Decl. Exh. G ¶ 4; Rim Decl. Exh. I ¶ 3; Rim Decl. Exh. H ¶ 4.  
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1 this trying time.<sup>81</sup>

2 In short, Respondents disregarded nearly every CDC guideline for controlling  
3 and managing COVID-19 at correctional facilities and refused to make necessary  
4 changes to protect prisoners. One of the only changes they made – cutting off almost  
5 all communication with the outside world – had negative impacts on the prisoners’  
6 mental health and therefore was not part of the CDC’s recommendations. This  
7 change was not based on science, nor is it a uniform practice instituted in other  
8 detention facilities—it is clearly an attempt to insulate Terminal Island from  
9 discovery of its failures, Respondents’ consistent repudiation of scientific expertise  
10 has resulted in nearly 700 prisoners contracting COVID-19 and 8 people dying.

11 **3. Respondents defied Attorney General Barr’s direction to**  
12 **“immediately maximize appropriate transfers” to home**  
13 **confinement**

14 Respondents also ignored explicit powers granted to them by Congress and  
15 directions by Attorney General Barr to reduce the density of the prison population to  
16 protect prisoners and the public from COVID-19. On March 26, 2020, prior to the  
17 passage of the CARES Act, Attorney General William Barr directed the BOP to  
18 prioritize the use of “various statutory authorities to grant home confinement for  
19 prisoners seeking transfer in connection with the COVID-19 pandemic” because  
20 “for some eligible inmates, home confinement might be more effective in protecting  
21 their health.”<sup>82</sup> He identified as two of the critical, discretionary factors for  
22 consideration (1) “[t]he age and vulnerability of the prisoner to COVID-19, in  
23 accordance with the Centers for Disease Control and Prevention (CDC) guidelines,”  
24

25 <sup>81</sup> <https://www.cdcr.ca.gov/covid19/covid-19-response-efforts/#VCMP>

26 <sup>82</sup> Rim Decl. Exh. D (Memorandum For Director of Bureau of Prisons re  
27 Prioritization of Home Confinement As Appropriate in Response to COVID-19  
28 Pandemic, Office of the Attorney General, Washington, D.C. (Mar. 26, 2020)) at 1.

1 and (2) “the security level of the facility,” with “priority given” to prisoners  
2 incarcerated “in low and medium security facilities.”<sup>83</sup> Many prisoners at Terminal  
3 Island squarely qualified for consideration because Terminal Island is low security  
4 and, as a category 3 care facility, houses many medically vulnerable prisoners.

5 The next day, on March 27, 2020, Congress enacted the CARES Act (P.L.  
6 116-136). Among other things, the CARES Act authorizes the Director of the BOP  
7 to lengthen the maximum amount of time that a prisoner may be placed on home  
8 confinement when the Attorney General “finds that emergency conditions will  
9 materially affect the functioning” of BOP. In the wake of the reported deaths of  
10 several prisoners incarcerated at FCI Oakdale, FCI, Danbury, and FCI Elkton,  
11 Attorney General Barr made quick use of his authority under the CARES Act to  
12 enable BOP to start exercising its broadened discretion, issuing a memo on April 3,  
13 2020, in which he made the requisite finding that “emergency conditions are  
14 materially affecting the functioning of the Bureau.”<sup>84</sup> The memo explained that the  
15 Bureau of Prisons was “experiencing significant levels of infection at several of our  
16 facilities.”<sup>85</sup> Noting the Bureau’s “profound obligation to protect the health and  
17 safety of all inmates,” Attorney General Barr directed the Bureau to “move with  
18 dispatch in using home confinement, where appropriate, to move vulnerable inmates  
19 out of these institutions.”<sup>86</sup>

20 Reflecting the urgency of the situation, Attorney General Barr’s memo  
21 directed *immediate action*. He directed prison officials to “immediately review all  
22 inmates who have COVID-19 risk factors, as established by the CDC,” to

23 \_\_\_\_\_  
24 <sup>83</sup> *Id.*

25 <sup>84</sup> Rim Decl. Exh. A at 1.

26 <sup>85</sup> *Id.*

27 <sup>86</sup> *Id.*



1 “immediately maximize appropriate transfers,” and to “begin implementing this  
2 directive immediately.”<sup>87</sup> The Attorney General made clear that the review was to  
3 include “*all at-risk inmates, not only those who were previously eligible for*  
4 *transfer.*”<sup>88</sup> Critically, he noted that, “[g]iven the speed with which this disease has  
5 spread through the general public, it is clear that time is of the essence,” and  
6 directed the Bureau to “implement this Memorandum as quickly as possible . . . .”<sup>89</sup>

7 On April 22, the BOP issued a memo purporting to interpret Attorney General  
8 Barr’s guidance, substantially limiting the number and types of people who might  
9 qualify for home confinement under the Attorney General’s memos.<sup>90</sup> Even though  
10 the April 3 Barr memo directed the BOP to “immediately maximize appropriate  
11 transfers to home confinement,” at “outbreak prisons,” including “all at-risk  
12 inmates, not only those who were previously eligible for transfer,” the BOP created  
13 its own criteria that is even more restrictive than the criteria the Attorney General  
14 had set forth *before the passage of the CARES Act* and excludes the vast majority of  
15 prisoners from consideration for release. For example, pursuant to the BOP’s  
16 guidance from April 22: prisoners must have had no disciplinary infractions of any  
17 kind for 12 months; and prisoners who have served 50% or more of their sentences  
18 or have 18 months or less remaining and have served 25% or more of their  
19 sentences receive priority.<sup>91</sup> After reports of positive cases continued to explode, on  
20 May 8, 2020, BOP amended this guidance to relax a few criteria, but it continues to

21 \_\_\_\_\_  
22 <sup>87</sup> *Id.*

23 <sup>88</sup> *Id.* at 2 (emphasis added).

24 <sup>89</sup> *Id.*

25 <sup>90</sup> Rim Decl. Exh. E (Memorandum from Correctional Programs Division Acting  
26 Assistant Director Andre Matevousian & Reentry Services Division Assistant  
27 Director Hugh J. Hurwitz to Chief Executive Officers (Apr. 22, 2020).

28 <sup>91</sup> *Id.* at 2.

1 be far more restrictive than the recommendations proposed by Attorney General  
2 Barr.<sup>92</sup>

3 And despite the explicit statutory authority under the CARES Act to place  
4 any prisoner in home confinement, and despite Attorney General Barr's urgent  
5 memorandum directing immediate action to review all inmates who have COVID-  
6 19 risk factors and *maximize* appropriate transfers, Respondent Ponce's use of her  
7 home confinement authority has been exceptionally *limited*. Since March 26, of the  
8 more than 1,000 inmates at Terminal Island, only 46 inmates have been considered  
9 and only 5 have been released.<sup>93</sup> Releasing five inmates does little to solve the  
10 problems of overcrowding at Terminal Island. And, at the current population levels,  
11 Terminal Island has proven simply unable to follow the CDC's recommendations  
12 regarding isolation and physical distancing to prevent the spread of COVID-19.  
13 Given the number of at-risk prisoners at Terminal Island, and the fact that few of the  
14 prisoners at this low security prison will present any danger to the public, there is no  
15 legitimate reason that so few people should have been considered for release to  
16 home confinement.<sup>94</sup>

17 Moreover, Terminal Island has thrown up roadblock after roadblock to  
18 prevent even those prisoners approved for release from actually leaving. Prisoner  
19 Johnny Stewart was approved for home release on April 22, 2020. Every time they  
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21 <sup>92</sup> Rim Decl. Exh. F (Memorandum from Correctional Programs Division Acting  
22 Assistant Director Andre Matevousian & Reentry Services Division Assistant  
23 Director Hugh J. Hurwitz to Chief Executive Officers (May 8, 2020)).

24 <sup>93</sup> [https://www.latimes.com/california/story/2020-05-05/coronavirus-covid-19-  
25 deaths-terminal-island-prison-california-fauci](https://www.latimes.com/california/story/2020-05-05/coronavirus-covid-19-deaths-terminal-island-prison-california-fauci)

26 <sup>94</sup> While not at Terminal Island, it is troubling that wealthy and politically  
27 connected prisoners like Paul Manafort, who do not meet BOP-enhanced time-  
28 served thresholds for consideration are still able to obtain release, when inmates of  
similar age, also with underlying conditions, on even shorter sentences for non-  
violent crime are abandoned to die.

1 were about to let him out, someone else in his dorm tested positive and so  
 2 Respondents started Mr. Stewart on a new 14-day quarantine period. He still has not  
 3 been released, even though he intends to move in with this sister and can self-isolate  
 4 in her four-bedroom home.<sup>95</sup> It is clear that without a structured, court-supervised  
 5 process for individualized consideration of each prisoner's suitability for release,  
 6 Respondents will not reduce the population density at Terminal Island, and COVID-  
 7 19 will continue to spread until each and every inmate and staff member has  
 8 contracted the virus.

9 **D. Respondents' Failure to Respond to the COVID-19 Pandemic Puts**  
 10 **Terminal Island Prisoners at a Heightened Risk of Injury and**  
 11 **Illness Unrelated to COVID-19.**

12 Compounding the risk to petitioners, Terminal Island is providing inadequate  
 13 health care for other, non-COVID-19-related conditions during this crisis. This is  
 14 especially problematic because many (or even most) prisoners are sent to Terminal  
 15 Island precisely because the prisoners have long-term medical needs. While there  
 16 have long been problems receiving timely or adequate medical care at overcrowded  
 17 Terminal Island,<sup>96</sup> those problems have escalated now that resources are being  
 18 consumed by vast numbers of COVID-19 patients. Non-virus medical needs go  
 19 unattended until someone needs urgent hospital care. Two examples of Terminal  
 20 Island's total dereliction of non-COVID-19 medical care follow:

21 Stephen Rines: Mr. Rines was incarcerated at Terminal Island until his  
 22 released on May 4, 2020. He has a spinal injury with no feeling in his body below  
 23 the waist.<sup>97</sup> A Foley catheter was inserted in Mr. Rines urethra while at another  
 24

25 <sup>95</sup> Rim Decl. Exh. S (Johnny Stewart Motion for Compassionate Release) at 4.

26 <sup>96</sup> Rim Decl. Exh. T ¶¶ 12-13.

27 <sup>97</sup> Rim Decl. Exh. J ¶ 2.

1 detention facility.<sup>98</sup> Although Mr. Rhines was informed that he needed see a  
 2 urologist in 30 days to have the catheter removed and thereafter use a particular kind  
 3 of catheters, Mr. Rhines was unable to schedule the required appointment once he  
 4 was transferred to Terminal Island.<sup>99</sup> He was unable to receive the needed medical  
 5 care and have Foley catheter removed until the matter reached a crisis, when he  
 6 developed an infection with pus coming out of his penis. At that time, Mr. Rhines  
 7 had to be moved to the short stay hospital unit.<sup>100</sup> But even then, he was not  
 8 provided with the right catheters.<sup>101</sup> The medical staff blamed the lack of  
 9 appropriate catheters on COVID-19.<sup>102</sup> No doctor ever examined his infection;  
 10 instead, medical staff just handed him an antibiotic without examining him or  
 11 running any tests.<sup>103</sup> Ultimately, Mr. Rines developed scarring in his urethra and  
 12 sphincter.<sup>104</sup>

13 Johnny Stewart: Mr. Stewart, prisoner at Terminal Island, suffers from  
 14 numerous medical conditions, including a Lipoma that hampers his mobility, He  
 15 reports that he has not been seen for pain management care for two months, even  
 16 though he informed staff that his periodic epidural is wearing off, and even though  
 17 his labs were ordered to be run on April 3, his medical records reflect that this has  
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20 <sup>98</sup> *Id.*, ¶ 3.

21 <sup>99</sup> *Id.* ¶¶ 3, 4.

22 <sup>100</sup> *Id.* ¶¶ 4, 5.

23 <sup>101</sup> *Id.*, ¶ 5.

24 <sup>102</sup> *Id.*

25 <sup>103</sup> *Id.*

26 <sup>104</sup> *Id.*

27  
 28

1 not yet occurred.<sup>105</sup>

2 More generally, Petitioner Vasquez has observed that prisoners at Terminal  
3 Island have been experiencing significant delays in receiving any routine medical  
4 treatment not related to COVID-19.<sup>106</sup> Petitioner Vasquez also reports that there is  
5 currently a scabies outbreak at Terminal Island that staff has been unable to  
6 control.<sup>107</sup> In short, because of the COVID-19 crisis, Respondents have been  
7 providing compromised medical care to their vulnerable prisoner population.

### 8 **III. ARGUMENT**

#### 9 **A. The Court Should Temporarily Enlarge Petitioners Custody** 10 **Pursuant to a Supervised, Individualized Inquiry and Require** 11 **Terminal Island to Provide Adequate Medical Care to COVID** 12 **Positive Patients.**

13 A Temporary Restraining Order (“TRO”) may be issued upon a showing “that  
14 immediate and irreparable injury, loss, or damage will result to the movant before  
15 the adverse party can be heard in opposition.” Fed. R. Civ. P. 65(b)(1)(A). The  
16 analysis for a TRO and a preliminary injunction is the same. *See Frontline Med.*  
17 *Assoc., Inc. v. Coventry Healthcare Workers Compensation, Inc.*, 620 F. Supp. 2d  
18 1109, 1110 (C.D. Cal. 2009) (“The standard for a temporary restraining order [] and  
19 a preliminary injunction are the same.”).

20 “A plaintiff seeking a preliminary injunction must establish that he is likely to  
21 succeed on the merits, that he is likely to suffer irreparable harm in the absence of  
22 preliminary relief, that the balance of equities tips in his favor, and that an injunction  
23 is in the public interest.” *Winter v. Nat’l Resources Defense Council*, 555 U.S. 7, 20  
24

25 \_\_\_\_\_  
<sup>105</sup> Rim Decl. Exh. S at 3-4.

26 <sup>106</sup> Rim Decl. Exh. I ¶ 9.

27 <sup>107</sup> *Id.* ¶ 8.  
28

1 (2008). The Ninth Circuit employs a “sliding scale” approach to *Winter*’s  
2 four-element test. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35  
3 (9th Cir. 2011). Under this approach, a preliminary injunction—and, thus,  
4 a temporary restraining order—may issue if the plaintiff raises at least “serious  
5 questions going to the merits” and demonstrates that “the balance of hardship tips  
6 sharply in the plaintiff’s favor,” but only so long as the plaintiff also satisfies the  
7 other *Winter* factors. *Id.* A stronger showing of one element may offset a weaker  
8 showing of another. *See id.* (“a stronger showing of one element may offset a  
9 weaker showing of another.”). A mandatory injunction can be issued only when the  
10 facts and law clearly favor the moving party. *Committee of Cen. Am. Refugees v.*  
11 *INS*, 795 F.2d 1434 (9th Cir. 1986); *Roman v. Wolf*, No. EDCV 20-00768 (TJH)  
12 (PVCx), 2020 WL 1952656, at \*12 (C.D. Cal. Apr. 23, 2020) (finding that plaintiffs  
13 had demonstrated “significantly more than a mere likelihood of success on the  
14 merits” of their claim that conditions of confinement at immigration detention center  
15 took away their ability to socially distance and remain safe from COVID-19).

16 A preliminary injunction is customarily granted on the basis of evidence that  
17 is less complete than what is presented at a trial on the merits. *Univ. of Texas v.*  
18 *Camenisch*, 451 U.S. 390, 395 (1981). The Court may consider hearsay and  
19 otherwise inadmissible evidence when considering whether to issue a preliminary  
20 injunction. *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1363 (9th Cir.  
21 1988). The Court can also take judicial notice of publicly accessible websites. *See*  
22 *King v. City of L.A.*, 885 F.3d 548, 555 (9th Cir. 2018).

23 Petitioners easily meet the standard for a TRO in this case. Petitioners have  
24 identified compelling evidence that Respondents have recklessly failed to act to  
25 control the spread of COVID-19 throughout Terminal Island, resulting in one of the  
26 worst outbreaks at any prison in the United States. Respondents’ shocking failure to  
27 follow the recommendations of the CDC or to reduce the population of overcrowded  
28 prisons, as Congress and the Attorney General authorized them to do, has created

1 substantial risks to the health and lives of its prisoner population, most of whom  
2 meet the established criteria for medical vulnerability to COVID-19. Immediate  
3 action is needed to prevent additional deaths. Terminal Island must decrease the  
4 number of persons held at Terminal Island to allow for greater social distancing and  
5 to improve the medical care and monitoring for those who have tested positive but  
6 are not released.

7 **B. Petitioners Are Likely To Succeed on the Merits of Their Eighth**  
8 **Amendment Claims**

9 The facts and the law clearly favor Petitioners on their claim that  
10 Respondents' failure to protect Terminal Island prisoners from conditions of  
11 confinement that exposed them to a serious, life-threatening illness violates the  
12 Eighth Amendment. The Eighth Amendment protects those in detention against  
13 conditions of confinement that are "very likely to cause serious illness and needless  
14 suffering." *Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("It would be odd to deny  
15 an injunction to inmates who plainly proved an unsafe, life threatening condition in  
16 their prison on the ground that nothing yet had happened to them.") The law is clear  
17 that when prison authorities "strip [prisoners] of virtually every means of self-  
18 protection and foreclose[] their access to outside aid, [they] are not free to let the  
19 state of nature take its course." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The  
20 Government cannot be "deliberately indifferent to the exposure of [prisoners] to a  
21 serious communicable disease." *Helling*, 509 U.S. at 33.

22 Prison officials violate a prisoner's Eighth Amendment right to humane  
23 conditions of confinement when two conditions are met. First, under the "objective"  
24 component of the analysis, "the alleged deprivation must be, 'objectively,'  
25 sufficiently serious." *Farmer v. Brennan*, 511 U.S. at 825. Second, under the  
26 "subjective" component, prison officials must have acted with a "sufficiently  
27 culpable state of mind," namely, "'deliberate indifference' to inmate health or  
28 safety." *Id.* at 834.

1                   **1. The Conditions at Terminal Island, Combined with the Risks**  
2                   **Posed by COVID-19, Create a Serious Medical Need**

3           To establish the “objective” element of an Eighth Amendment violation  
4 “based on a failure to prevent harm, the inmate must show that he is incarcerated  
5 under conditions posing a substantial risk of serious harm.” *See Farmer*, 511 U.S. at  
6 834. This standard is easily met here. Courts have routinely found that exposure to  
7 disease or health issues constitutes a serious harm. *See, e.g., Helling*, 509 U.S. at 33  
8 (finding that the reach of the Eighth Amendment includes “exposure of inmates to a  
9 serious, communicable disease”); *Jeffries v. Block*, 940 F. Supp. 1509, 1514 (C.D.  
10 Cal. 1996) (agreeing that “tuberculosis is a serious contagious disease, which  
11 presents a serious risk to inmate health”); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d  
12 Cir. 1996) (“[C]orrectional officials have an affirmative obligation to protect  
13 [forcibly confined] inmates from infectious disease.”).

14           Simply put, the risks of serious harm due to the COVID-19 outbreak are  
15 undeniable. The disease is highly contagious and spreads rapidly in close settings—  
16 it has already killed over 90,000 people in the United States and it may cause long-  
17 term organ damage even in people who present with minimal or no symptoms.  
18 Terminal Island itself is home to one of the worst outbreaks at a federal prison in the  
19 United States. According to BOP’s own numbers, nearly 70% of inmates at  
20 Terminal Island, many of whom are considered at special risk for serious illness or  
21 death based on their age or underlying medical conditions, have tested positive for  
22 COVID-19 in the past two months. Eight inmates have already died, and  
23 presumably many more have been hospitalized. The structure of the prison itself  
24 heightens the risk of transmission, since prisoners are incapable of social distancing  
25 with many prisoners living in large dorms of 50 or more people, and even those  
26 prisoners in two-person cells share bathrooms with large numbers of inmates.  
27 Moreover, the medical system at Terminal Island has been overwhelmed dealing  
28 with the large numbers of medically vulnerable COVID-19 patients, meaning that



1 many get no medical monitoring, and little, no, or inadequate medical treatment.<sup>108</sup>

2 Recognizing both COVID-19’s ferocious attack on the human body and its  
 3 extreme infectiousness, which is exacerbated in congregate settings like prisons,  
 4 courts across the country have found that COVID-19 specifically presents a  
 5 substantial risk of serious harm to prisoners. *See, e.g., Martinez-Brooks v. Easter*,  
 6 No. 3:20-cv-00569-MPS, 2020 WL 2405350, at \*20–21 (D. Conn. May 12, 2020);  
 7 *Fraihat v. U.S. Immigration and Customs Enforcement*, --F.Supp.--, 2020 WL  
 8 1932570, at \*23 (C.D. Cal. April 20, 2020); *Basank v. Decker*, No. 20-cv-2518  
 9 (AT), 2020 WL 1481503, at \*3, 5 (S.D.N.Y. Mar. 26, 2020) (citing *United States v.*  
 10 *Stephens*, No. 15-cr-95 (AJN), No. 15-cr-95 (AJN), 2020 WL 1295155, at \*2  
 11 (S.D.N.Y. Mar. 19, 2020) and *United States v. Garlock*, No. 18-cr-418 (VC), No.  
 12 18-cr-00418-VC-1, 2020 WL 1439980, at \*1 (N.D. Cal. Mar. 25, 2020)); *Cameron*  
 13 *v. Bouchard*, No. 20-cv-10494, at p. 49-40 (E.D. Mich. May. 21, 2020). As in each  
 14 of these cases, there can be no reasonable dispute that a substantial risk of serious  
 15 harm is present here.<sup>109</sup>

16 \_\_\_\_\_  
 17 <sup>108</sup> Prisoners have also been unable to obtain medical care for their other, non-  
 18 COVID-19-related serious medical conditions which is what got them sent to  
 Terminal Island’s Care 3 facility in the first place.

19 <sup>109</sup> In dicta in a case involving a pre-trial detainee, a three-judge panel of the Ninth  
 20 Circuit recently stated that to satisfy the “objective” test, there is an additional  
 21 requirement that a convicted prisoner show that the condition of confinement must  
 22 cause “suffering inconsistent with contemporary standards of decency.” *Smith v.*  
 23 *Washington*, 781 Fed. Appx. 595, 598 (9th Cir. 2019). Other courts in the Ninth  
 24 Circuit fold this notion directly into the concept of “serious harm.” *See e.g., Perez v.*  
 25 *Cox*, 788 Fed. Appx. 438, 442 (9th Cir. 2019); *Hill v. Dexter*, No. EDCV 09-778  
 26 VBF (DTB), 2010 WL 2631661, at \*3 (C.D. Cal, March 2, 2010). Even if a separate  
 27 such showing were required, Petitioners satisfy that here. In unprecedented actions  
 28 taken in modern times, nearly every state in the United States and countries across  
 the world shut down their economies to all but essential businesses to prevent the  
 spread of COVID-19. Hospital administrators have warned of an impending mental  
 health crisis in even veteran physicians working with COVID-19 patients from  
 witnessing the devastating impact of the virus on patients. *See e.g. Wilber*,

1                   **2. Respondents Acted With Deliberate Indifference to the**  
 2                   **Health and Safety of COVID-19 Negative Prisoners.**

3           Petitioners can also show that the facts and law clearly favor a finding that  
 4 Respondents have been deliberately indifferent to the health and safety of the  
 5 prisoners in their care. Sentenced inmates bringing claims under the Eighth  
 6 Amendment can show deliberate indifference through evidence that the respondent  
 7 was “aware of the facts from which the inference could be drawn that a substantial  
 8 risk of serious harm exists,” that the Respondent actually “dr[ew] the inference” and  
 9 “disregard[ed] that risk by failing to take reasonable measures to abate it.” *Farmer*,  
 10 511 U.S. at 837.

11           It is undeniable that Respondent Warden Ponce and Respondent Carvajal  
 12 knew of the substantial risk of serious harm posed by a COVID-19 outbreak at  
 13 Terminal Island. In mid-March, cities and states around the country took the  
 14 extraordinary measure of completely shutting down (with the exception of essential  
 15 services) in order to protect their citizens from the ghastly impact of COVID-19. On  
 16 April 3—more than a month and a half ago—Attorney General Barr issued an  
 17 urgent memo to the Bureau of Prisons regarding COVID-19, noting the “significant  
 18 levels of infection at several of our facilities” and the “dangers that COVID-19  
 19 poses to our vulnerable inmates.”<sup>110</sup> And, “given the pervasive daily media coverage  
 20 of the pandemic, the seriousness of the threat posed by COVID-19—and the  
 21 particular vulnerability of elderly individuals as well as those with certain  
 22

23 \_\_\_\_\_  
 24 Delquinton, “Hospitals Prepare for Wave of Mental Health Disorders Among Their  
 25 Workers,” Los Angeles Times (May 6, 2020), *available at*  
 26 <https://www.latimes.com/politics/story/2020-05-06/hospitals-prepare-for-wave-of-mental-health-disorders-among-their-workers>. Clearly, failing to follow basic  
 27 guidance provided by the CDC to prevent the suffering caused by exposure to  
 28 COVID-19 is inconsistent with contemporary standards of decency.

<sup>110</sup> Rim Decl. Exh. A at 1.

1 preexisting medical conditions—are so well known that it would be implausible to  
 2 suggest that prison officials are unaware of this risk.” *Martinez-Brooks*, 2020 WL  
 3 2405350, at \*21 (citing and quoting *Farmer*, 511 U.S. at 842 (“[A] fact finder may  
 4 conclude that a prison official knew of a substantial risk from the very fact that the  
 5 risk was obvious.”)).

6 It is equally clear that Respondents did not take reasonable steps to protect  
 7 prisoners at Terminal Island from that harm because they flouted – and continue to  
 8 flout – guidance by Attorney-General Bar and the guidance provided by the CDC on  
 9 the key steps correctional facilities must take to address COVID-19.<sup>111</sup>

10 In particular, while the CDC stressed that social distancing of at least six feet  
 11 “is a cornerstone of reducing transmission of respiratory illnesses,”<sup>112</sup> Respondents  
 12 steadfastly refuse to implement measures that would allow for appropriate social  
 13 distancing. Terminal Island was at more than 130% capacity and overcrowded when  
 14 the pandemic began. The majority of the prisoners live and sleep in a perpetual large  
 15 gathering – in 50 to 60-person open-plan dormitories with bunk beds separated by  
 16 four feet or less, with shared common bathrooms with no more than four toilets and  
 17 showers. A smaller number of prisoners live in large blocks of tiny, two-man cells,  
 18 close enough to touch their cellmate. In these cell blocks, 50 people share just four  
 19 toilets, four showers, and four sinks and it is impossible to avoid personal contact in  
 20 the crowded hallways. “[A]t a time when public health officials are counseling strict  
 21

22 <sup>111</sup> Justice Sotomayor has suggested that to provide constitutionally adequate care of  
 23 prisoners, prison officials may need to take steps beyond those prescribed by the  
 24 CDC. *See Valentine v. Collier*, No. 19A1034, 590 U.S. \_\_\_\_ (2020), 2020 WL  
 249751, at \*2 n.2 (May 14, 2020) (Mem) (Sotomayor, J.).

25 <sup>112</sup> *see also* Social Distancing, Centers for Disease Control and Prevention (April 15,  
 26 2020), [https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html)  
 27 [distancing.html](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html) (“Limiting face-to-face contact with others is the best way to reduce  
 28 the spread of [COVID-19],” including staying at least 6 feet from other people and  
 avoiding group gatherings.).

1 adherence to social distancing practice, most inmates at [Terminal Island] live in  
 2 close contact with [at least 50] other inmates, in a facility with a serious, active  
 3 COVID-19 outbreak.” *See Martinez-Brooks*, 2020 WL 2405350, at \*21 (discussing  
 4 in context of FCI Danbury).

5 Respondents may contend that they opened warehouses and tents as  
 6 makeshift living spaces to allow for social distancing. But these moves were a  
 7 charade—undertaken solely so that officials could say they did something, without  
 8 actually achieving a change in the conditions that spread the virus. In fact, as a result  
 9 of Respondents’ actions, the medically vulnerable prisoners were crammed into  
 10 bunks that were placed *closer together* than in their unit housing. These makeshift  
 11 housing spaces were not only congested, they were unsanitary, vermin-infested, and  
 12 freezing cold.<sup>113</sup> In short, after the outbreak began, Respondents moved their  
 13 medically-vulnerable prisoners into conditions more likely to foment spread of the  
 14 disease than reduce it. The hard numbers tell the story here. According to Terminal  
 15 Island, they moved 200 prisoners into these unsanitary field tents and warehouses.<sup>114</sup>  
 16 But that still leaves 842 prisoners in a prison with a rated capacity of only 779. In  
 17 other words, today, *nearly three months after guidance was issued to reduce the*  
 18 *density of prison populations and implement social distancing, Terminal Island*  
 19 *remains not just crowded, but overcrowded.*

20 Respondents compounded the problems caused by overcrowding by refusing  
 21 to heed the CDC’s recommendations for contact tracing, quarantining, and isolating  
 22 confirmed and suspected cases of COVID-19. The CDC recommends that all  
 23

24 <sup>113</sup> Rim Decl. Exh. H ¶ 6; Rim Decl. Exh. I ¶ 5 (explaining that 60 prisoners were  
 25 made to share 3 showers and 3 toilets).

26 <sup>114</sup> Sara Welch, Nouran Salahieh, *More than half of Terminal Island prison inmates*  
 27 *test positive for coronavirus, the worst outbreak in federal system*, KTLA 5 (April  
 28 29, 2020), available at <https://ktla.com/news/local-news/terminal-island-prisonsees-worst-coronavirus-outbreak-among-inmates-in-federal-system/>

1 individuals who have had close contact with a COVID-19 case be quarantined for  
2 14 days, ideally in a single cell, and anyone with a confirmed or suspected case  
3 should be isolated to prevent contact with others.<sup>115</sup> As discussed above, at  
4 Terminal Island, confirmed and suspected cases are sent to the short stay hospital  
5 unit alongside patients being treated for unrelated problems, actively creating new  
6 contacts between the sickest COVID-19 patients and medically vulnerable  
7 prisoners.<sup>116</sup> Sick, symptomatic prisoners are routinely left in dorms with healthy  
8 prisoners until eventually they get so sick that there is no choice but to remove  
9 them.<sup>117</sup> In J Unit, an open plan dormitory which currently houses prisoners that  
10 tested negative, groups of 10 to 20 people are moved in and out of the unit two to  
11 three times a week, exposing the prisoners to an ever-widening circle of contacts.<sup>118</sup>  
12 Respondents are not even following their own written guidelines, in which they  
13 represent that they can and will isolate confirmed cases in single cells.<sup>119</sup> Even  
14 symptomatic prisoners with confirmed cases of COVID-19 continue to live in  
15 congregate housing.<sup>120</sup>

16         Given the close contact between healthy and sick prisoners at Terminal  
17 Island, it is especially imperative that prison officials clean and disinfect living  
18 spaces, common spaces and bathrooms frequently and make appropriate use of PPE  
19

20 <sup>115</sup> Rim Decl. Exh. C at 3-4.

21 <sup>116</sup> Rim Decl. Exh. J ¶ 10

22 <sup>117</sup> Rim Decl. Exh. H ¶ 9; Threatt Decl. ¶ 4.

23 <sup>118</sup> Threatt Decl. ¶ 5. Prisoners in J Unit also cross paths with prisoners held in  
24 different portions of J Unit when they get food. Threatt Decl. ¶ 6.

25 <sup>119</sup> Rim Decl. Exh. Q (FCI Terminal Island Modified Operations In Response to  
26 COVID-19) at 4.

27 <sup>120</sup> Rim Decl. Exh. H ¶ 9.

28

1 to reduce the spread of COVID-19.<sup>121</sup> But Respondents also defied CDC guidelines  
 2 with respect to sanitation and PPE. Respondents continue to provide prisoners with  
 3 insufficient quantities of diluted disinfectants that make it impossible to adequately  
 4 rid living spaces of the virus.<sup>122</sup> This is especially significant because all of the  
 5 cleaning is left to the prisoners.<sup>123</sup> CDC guidance requires confirmed or suspected  
 6 COVID-19 cases in congregate living spaces to wear face masks at all times and  
 7 instructs that masks should be changed at least *daily*. Respondents internal  
 8 guidelines fall short of this, stating that they would provide prisoners only one new  
 9 mask a week, but they did not follow even their own guidelines.<sup>124</sup> To date,  
 10 prisoners have been issued only two masks total, and the masks are laundered just  
 11 once a week.<sup>125</sup> That means that prisoners must reuse dirty masks,<sup>126</sup> which is  
 12 problematic since the virus can last on cloth masks for two days.<sup>127</sup> Significantly,  
 13 guards were not provided with PPE until late in the outbreak and even now, not all  
 14 guards wear masks.<sup>128</sup> Given that BOP does not compel testing for guards,<sup>129</sup> the  
 15 failure to ensure that all guards wear their masks puts the prisoners at heightened

16 \_\_\_\_\_  
 17 <sup>121</sup> Rim Decl. Exh. K ¶ 4.

18 <sup>122</sup> Rim Decl. Exh. I ¶ 7; Threatt Decl. ¶ 6.

19 <sup>123</sup> Threatt Decl. ¶ 6.

20 <sup>124</sup> Rim Decl. Exh. G ¶ 12

21 <sup>125</sup> Threatt Decl. ¶ 4.

22 <sup>126</sup> Rim Decl. Exh. G ¶ 12

23 <sup>127</sup> [https://www.healthline.com/health/how-long-does-coronavirus-last-on-](https://www.healthline.com/health/how-long-does-coronavirus-last-on-surfaces#shoes-and-clothing)  
 24 [surfaces#shoes-and-clothing](https://www.healthline.com/health/how-long-does-coronavirus-last-on-surfaces#shoes-and-clothing)

25 <sup>128</sup> Rim Decl. Exh. G ¶ 12.

26 <sup>129</sup> [https://www.huffpost.com/entry/terminal-island-federal-prison-](https://www.huffpost.com/entry/terminal-island-federal-prison-coronavirus_n_5ebc20f5c5b6f021bf47c008?ncid=engmodushpimg00000006)  
 27 [coronavirus\\_n\\_5ebc20f5c5b6f021bf47c008?ncid=engmodushpimg00000006](https://www.huffpost.com/entry/terminal-island-federal-prison-coronavirus_n_5ebc20f5c5b6f021bf47c008?ncid=engmodushpimg00000006)

1 risk of exposure.

2 Finally, Respondents' failure to transfer medically vulnerable prisoners from  
3 Terminal Island to home confinement in any meaningful numbers evidences  
4 deliberate indifference. On April 3, Attorney General Barr explicitly directed  
5 Respondents to "immediately review all inmates who have COVID-19 risk factors,  
6 as established by the CDC," to "immediately maximize appropriate transfers."<sup>130</sup>  
7 Attorney General Barr further directed that these actions be taken "as quickly as  
8 possible," emphasizing that time is of the essence. But Respondents failed to follow  
9 these directions. They have only considered 46 of approximately 1,051 inmates for  
10 home confinement and released only 5, even though Terminal Island is a low  
11 security prison, which means that its prisoners present little risk to the community.  
12 Even medically vulnerable prisoners with established, stable plans for home  
13 confinement, have not been able to secure release.<sup>131</sup> Pursuant to Attorney General  
14 Barr's directions, Respondents should have considered prisoners like Scott Cutting  
15 for release. Cutting, 70, who had long-term, pre-existing medical conditions, which  
16 BOP has acknowledged put him at risk of developing more severe COVID-19, was  
17 sentenced to serve just 26-months for tax fraud. He did not present a danger to the  
18 public. But Respondents did not release Mr. Cutting, and he contracted COVID-19  
19 and died.<sup>132</sup> It is clear that Respondents are simply ignoring the tools in their  
20 possession that, if utilized, would protect the released medically vulnerable  
21 prisoners, reduce the density of the prisoner population, and allow for better  
22 physical distancing and other preventative measures, as well as better medical care  
23

24 <sup>130</sup> Rim Decl. Exh. A at 2.

25 <sup>131</sup> Rim Decl. Exh. G ¶ 25; Rim Decl. Exh. H ¶ 11.

26 <sup>132</sup> Inmate Death at Terminal Island (May 9, 2020), *available at*  
27 [https://www.bop.gov/resources/news/pdfs/20200509\\_press\\_release\\_tmi.pdf](https://www.bop.gov/resources/news/pdfs/20200509_press_release_tmi.pdf)  
28

1 and treatment for the inmates that remain.<sup>133</sup>

2 Respondents’ wholesale refusal and failure to follow accepted medical  
 3 protocol and legal guidance, particularly in the face of positive cases, amounts to  
 4 deliberate indifference under well-settled law. See, e.g., *Hernandez v. County of*  
 5 *Monterey*, 110 F. Supp. 3d 929, 943 (N.D. Cal. 2015) (stating that “known  
 6 noncompliance with generally accepted guidelines for inmate health strongly  
 7 indicates deliberate indifference to a substantial risk of serious harm”); *Cameron v.*  
 8 *Bouchard*, No. 20-cv-10494, 2020 WL 1929876, at \*2 (April 17, 2020), *modified on*  
 9 *other grounds on motion for reconsideration*, 2020 WL 1952836, (Apr. 23, 2020).  
 10 (preliminarily finding deliberate indifference in violation of the Eight Amendment  
 11 when jail “has not imposed even the most basic safety measures recommended by  
 12 health experts, the Centers for Disease Control and Prevention, and Michigan’s  
 13 Governor to reduce the spread of COVID-19 in detention facilities”). Indeed, a  
 14 failure by a prison to implement safety and hygiene procedures in the face of an  
 15 infectious disease outbreak is a classic example of deliberate indifference violating  
 16 the Eighth Amendment. See, e.g., *Feliciano v. Gonzales*, 13 F. Supp. 2d 151, 208–  
 17 09 (D.P.R. 1998) (finding that the defendant’s “inability ... to properly isolate cases  
 18 of active tuberculosis,” the “insufficient medical dormitory beds,” the failure to  
 19 “fully screen incoming inmates,” and the failure to “provide for a sick call system  
 20 that ensures access to care and that is capable of effectively handling emergencies”  
 21 constituted deliberate indifference); *Martinez-Brooks*, 2020 WL2405350, at \*22  
 22 (finding likelihood of success shown on deliberate indifference claim where Warden

23 \_\_\_\_\_  
 24 <sup>133</sup> Significantly, the deleterious health impacts of Respondents’ failures reach  
 25 beyond just the virus itself because, since the outbreak began, medically vulnerable  
 26 prisoners have experienced significant delays in receiving treatment for any  
 27 conditions that are not COVID-19. Former prisoner Rines, in particular, has been  
 28 left with lasting scarring to his urethra and sphincter because he was unable to get  
 his Foley catheter removed on time or obtain appropriate replacement catheters. Rim  
 Decl. Exh. J ¶ 3.



1 failed to transfer medically vulnerable prisoners from FCI Danbury to home  
2 confinement in any meaningful numbers during COVID-19 crisis).

3 **3. Respondents Acted With Deliberate Indifference to the**  
4 **Medical Needs of COVID-19 Positive Prisoners.**

5 It is also clear that Respondents have acted with deliberate indifference to the  
6 medical needs of Terminal Island prisoners who tested positive for COVID-19.  
7 Deliberate indifference to medical needs may be shown when prison officials deny,  
8 delay or internationally interfere with medical treatment or it may be shown by the  
9 way in which prison physicians provide medical care.” *Jett v. Penner*, 439 F.3d  
10 1091, 1096 (9th Cir. 2006).

11 Respondents here have denied, delayed and provided constitutionally  
12 inadequate care. Prisoners with low blood oxygen levels wait for many, likely  
13 critical, hours to be transferred to the hospital.<sup>134</sup> Petitioners are not being regularly  
14 monitored and treated.<sup>135</sup> Petitioners are unable to even speak with a doctor to talk  
15 about their prognosis or treatment options.<sup>136</sup> No one is recording Petitioners’  
16 subjective symptoms, such as cough, aches, chest pain or difficulty breathing.  
17 Respondents are only doing temperature checks.<sup>137</sup> But temperature checks alone  
18 do not provide an adequate picture of patient health. One study has indicated that  
19 70% of patients sick enough to be admitted to the hospital due to COVID-19 did not  
20 have a fever.<sup>138</sup> By failing to also monitor more subjective symptoms, Respondents

21 \_\_\_\_\_  
22 <sup>134</sup> Rim Decl. Exh. J ¶ 10.

23 <sup>135</sup> Rim Decl. Exh. G ¶ 21-22.

24 <sup>136</sup> *Id.* ¶ 21; Threatt Decl. ¶ 4.

25 <sup>137</sup> Threatt Decl. ¶ 4.; Rim Decl. Exh. G ¶ 21.

26 <sup>138</sup> [https://www.washingtonpost.com/health/2020/04/22/coronavirus-ventilators-  
27 survival/](https://www.washingtonpost.com/health/2020/04/22/coronavirus-ventilators-survival/)  
28

1 are missing a critical opportunity to identify patients who may be deteriorating.  
2 Respondents are not even taking the minimal step of providing prisoners with over-  
3 the-counter medications such as acetaminophen to reduce fever.<sup>139</sup> Anyone with a  
4 fever that has not reached 101 degrees and remained there or higher for an extended  
5 period of time is told to simply “hang in there.”<sup>140</sup> Prisoners at Terminal Island are  
6 unable to obtain medical care until they are “literally on the floor dying.”<sup>141</sup>

7 Respondents’ failure to follow CDC guidance regarding treatments and utter  
8 abdication in providing requested medical care for COVID-19 symptoms is  
9 evidence of deliberate indifference. *See, e.g. Banks v. Booth*, No. 20-849 (CKK), 20  
10 CV 00849 (CKK), at \*10, 21 (D.D.C. April 20, 2020) (fact that “inmates who have  
11 requested medical aid for COVID-19 symptoms report long waits for medical care,  
12 testing or separation from the general population” is evidence of deliberate  
13 indifference). Significantly, Respondents’ level of medical care falls far below other  
14 prisons faced with the challenges of COVID-19. Other prisons are providing  
15 multiple vital-sign assessments by medical staff each day, in addition to temperature  
16 checks, are monitoring subjective symptoms, and are providing medication to  
17 control fever. *See, e.g. Camacho Lopez v. Lowe*, No. 3:20-CV-563, 2020 WL  
18 1689874, at \*7 (M.D. Pa. Apr. 7, 2020) (finding no deliberate indifference because  
19 prisoner was placed in medical isolation as soon as he tested positive, was given at  
20 least three vital-sign assessments by medical staff daily, in addition to twice-daily  
21 temperature checks, medication as needed to control his fever, and a prescription for  
22

23 \_\_\_\_\_  
24 <sup>139</sup> <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html>

25 <sup>140</sup> *See also* Rim Decl. Exh. I ¶ 6.

26 <sup>141</sup> Threatt Decl. ¶ 6. Since this is happening in a dorm with negative prisoners, the  
27 failure to remove and treat sick individuals means that additional prisoners are being  
28 exposed to COVID-19.

1 a multivitamin and Gatorade for nourishment and hydration); *Derron B. v.*  
2 *Tsoukaris*, No. 20-3679 (JMV), 2020 WL 2079300, at \*11 (D.N.J. Apr. 30, 2020)  
3 (finding no deliberate indifference where prisoners are being seen on a daily basis  
4 during which their subjective complaints are recorded and their vital signs, along  
5 with other relevant testing such as temperature). Dr. Samra, who works in  
6 correctional institutions, and is familiar with appropriate standards in such settings,  
7 notes that Terminal Island’s failure to provide monitoring, treat those who display  
8 symptoms, and provide access to physicians does not provide the minimum level of  
9 acceptable care.<sup>142</sup>

10 Dr. Samra further explains that “vulnerable individuals—who comprise a  
11 larger portion of Terminal Island’s population than in the average prison—are at  
12 particularly high risk for materially negative health consequences that will require  
13 aggressive and immediate medical intervention.”<sup>143</sup> In the context of a very limited  
14 healthcare system at a prison facility (and possible staffing shortages due to  
15 COVID-19 outbreak among staff), “the inability to swiftly identify those prisoners  
16 in need of substantial and proactive medical intervention and either begin an  
17 appropriate treatment regimen or transport them to a civilian hospital will only cause  
18 needless pain and deaths. And this additional strain on the healthcare system does  
19 not even account for the already substantial strain that exists at a facility like  
20 Terminal Island, where many prisoners require regular medical treatment for  
21 chronic underlying conditions.” Given the enormous number of medically  
22 vulnerable prisoners who have tested positive at Terminal Island, it is hard to  
23 imagine how Terminal Island could provide constitutionally adequate medical care  
24 at this time. *United States v. Fischman*, No. 16-cr-00246-HSG-1, 2020 WL  
25 2097615, at \*2 (N.D. Cal. May 1, 2020) (releasing COVID-19 positive prisoner

26 \_\_\_\_\_  
27 <sup>142</sup> Rim Decl. Exh. K ¶ 18.

28 <sup>143</sup> Rim Decl. Exh. K ¶ 19.

1 from Terminal Island and finding that “the government could not provide detail  
2 about [the prisoner’s] specific treatment status or explain how FCI Terminal Island  
3 is ensuring the safety and health of inmates given the exponential growth in cases  
4 over such a short time.”)

5 Because Terminal Island cannot provide adequate care to the prisoners  
6 entrusted to it right now, prisoners must be evaluated for home confinement  
7 pursuant to a structured, court-supervised process for making individualized  
8 determinations for release *as soon as possible*. Prisoners who are not dangerous and  
9 have appropriate release plans must be released to home confinement.

10 For those prisoners who will remain at FCI Terminal Island, and who have or  
11 will test positive, the Court should grant injunctive relief that requires Respondents  
12 to follow CDC guidelines and provide essential medical treatment and monitoring.  
13 Prisoners should be monitored by doctors or medical staff about their symptoms and  
14 prognosis so that they can be aware of any change in their health that marks a  
15 potential decline. Moreover, once the population density at Terminal Island has been  
16 reduced, Respondents can and must begin treating underlying conditions once again,  
17 which, of course, is recommended by the CDC.<sup>144</sup>

18 **4. Petitioners Are Not Required To Exhaust Administrative**  
19 **Remedies Here.**

20 Respondents have not yet raised an affirmative defense of failure to exhaust  
21 administrative remedies, but based on the arguments BOP has made in other similar  
22 cases, Respondents expect that the BOP will argue that Petitioners are unlikely to  
23 succeed on their claims for relief because they failed to exhaust administrative  
24 remedies.

25 **a. Exhaustion of administrative remedies for the § 2241**  
26

27 <sup>144</sup> [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html)  
28 [higher-risk.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html)

1 **claim should be waived**

2 In the Ninth Circuit, “the exhaustion requirement is prudential, rather than  
3 jurisdictional, for habeas claims.” *Hernandez v. Sessions*, 872 F.3d 976, 988 (9th  
4 Cir. 2017). There are two potential administrative processes that BOP may argue  
5 must first be exhausted: (1) home detention consideration under the CARES Act,  
6 and (2) requests for compassionate release under the First Step Act. Both of these  
7 arguments lack merit.

8 As an initial matter, with respect to release under the CARES Act, the  
9 exhaustion require has already been met because *there is no administrative process*  
10 for CARES Act release to home confinement. BOP has told prisoners, “[I]nmates do  
11 not need to apply or request to be considered for CARES act” release to home  
12 confinement.<sup>145</sup> There is no way for prisoners to make a case to BOP as to why they  
13 should be considered for CARES Act release, including no way for them to present  
14 a release plan.

15 With respect to compassionate release, while typically BOP has 30 days to  
16 respond to such applications, the Ninth Circuit has held that the exhaustion  
17 requirement does not apply when the petitioner is likely to suffer an irreparable  
18 injury without immediate judicial relief, where administrative remedies are  
19 inadequate or not efficacious or where pursuit of the administrative remedy would  
20 be futile. *Id.* The Ninth Circuit’s principles regarding equitable waiver of exhaustion  
21 requirements have been specifically applied by at least one court to find that  
22 exhaustion is waived with respect to a COVID-19 positive prisoner seeking  
23 compassionate release from Terminal Island. *Fischman*, 2020 WL 2097615, at \* 3.  
24 As the court explained in *Fischman*, under current circumstances, pursuing  
25 administrative remedies at Terminal Island is futile and risks irreparable injury to  
26

27 <sup>145</sup> See Rim Decl. Exh. R at 2 (Talking Points for Inmates Asking About Early  
28 Releases During Covid-19 as of 4/20/20).

1 prisoners who face an elevated risk of serious illness and death from COVID-19:

2 ***[A]s the Bureau of Prisons faces a prison population at***  
 3 ***FCI Terminal Island where over 60% of inmates have***  
 4 ***COVID-19, the Court finds no reason to conclude that a***  
 5 ***response from the Bureau of Prisons is possible, let alone***  
 6 ***likely within the next business day. . . [u]nfortunately, [the***  
 7 ***petitioner’s] health has already been compromised in the***  
 8 ***few weeks since he filed this motion. Indeed, [his] case***  
 9 ***illustrates the difference that just a few days’ delay may***  
 10 ***have under these circumstances. [Petitioner] first tested***  
 11 ***negative for COVID-19 on April 24, 2020. Just four days***  
 12 ***later, on April 28, 2020, he tested positive.***

13 *Id.* (emphasis added). Similarly, another court found that equitable exhaustion was  
 14 excused for a prisoner at Lompoc seeking compassionate release because “[t]he  
 15 BOP is overwhelmed by the unique challenges COVID-19 presents within  
 16 correctional institutions and may simply not have the capacity to process  
 17 compassionate relief requests at the moment. The extraordinary and unprecedented  
 18 circumstances faced by prisons in light of the COVID-19 pandemic have rendered  
 19 administrative exhaustion futile.” *United States v. Connell*, -- F. Supp. 3d --, 2020  
 20 WL 2315858, at \*5 (N.D. Cal. May 8, 2020) (internal citations omitted). Moreover,  
 21 the *Connell* court found that “given the speed at which COVID-19 is spreading  
 22 within correctional institutions, each day of delay puts defendants at higher risk of  
 23 irreparable harm.” *Id.*; accord *Martinez-Brooks*, 2020 WL 2405350, at \*18–19  
 24 (finding exhaustion waived on section 2241 class action habeas request for release  
 25 to home confinement based on threat of COVID-19 exposure because Petitioners are  
 26 likely to suffer irreparable harm if required to exhaust, given the rapid spread of  
 27 COVID-19 at Danbury prison and the length of the administrative remedy process);  
 28 *cf. United States v. Paige*, 369 F. Supp. 2d 1257, 1259–60 (D. Mon. 2005) (finding  
 exhaustion waived in the context of a § 2241 claim).

As in *Fischman*, Petitioners will suffer irreparable harm if forced to wait 30  
 days for relief under the compassionate release process. Petitioners Wilson and  
 Smith have already been diagnosed with COVID-19 and are receiving no medical

1 monitoring nor medical treatment for their symptoms even though they are in a high  
 2 risk category due to pre-existing medical conditions, and COVID-19 patients can  
 3 decline suddenly.<sup>146</sup> Petitioner Vasquez is currently negative, but he is living in an  
 4 open plan dormitory with 40 other prisoners, who are separated by only two feet,  
 5 heightening his risk of contracting the illness.<sup>147</sup> Every day he remains at Terminal  
 6 Island increases his chance of contracting COVID-19 and suffering from severe  
 7 illness, organ damage or even death.

8 **b. Exhaustion is not required under the PLRA because an**  
 9 **administrative remedy is “effectively unavailable” at**  
 10 **this time.**

11 Petitioner is also seeking injunctive relief directly under the Eighth  
 12 Amendment of the United States Constitution to change Terminal Islands’ practices  
 13 with respect to medical treatment, isolation, quarantine, sanitation and use of PPE, a  
 14 claim that is subject to the Prison Litigation Reform Act (“PLRA”) and its  
 15 exhaustion requirement.<sup>148</sup> But the PLRA requires only that a prisoner exhaust  
 16

17 <sup>146</sup> Rim Decl. Exh. K ¶ 5; The Infection That’s Silently Killing Coronavirus  
 18 Patients, New York Times (April 20, 2020), *available at*  
 19 [https://www.nytimes.com/2020/04/20/opinion/sunday/coronavirus-testing-](https://www.nytimes.com/2020/04/20/opinion/sunday/coronavirus-testing-pneumonia.html)  
 20 [pneumonia.html](https://www.nytimes.com/2020/04/20/opinion/sunday/coronavirus-testing-pneumonia.html); Coronavirus symptoms might bet better before they get worse, and  
 21 the downturn can happen very quickly, doctors say, Business Insider (April 15,  
 22 2020), *available at* [https://www.businessinsider.com/coronavirus-symptoms-start-](https://www.businessinsider.com/coronavirus-symptoms-start-slow-and-worsen-quickly-doctors-say-2020-3)  
 23 [slow-and-worsen-quickly-doctors-say-2020-3](https://www.businessinsider.com/coronavirus-symptoms-start-slow-and-worsen-quickly-doctors-say-2020-3)

24 <sup>147</sup> While Petitioner Vasquez does not have underlying health conditions, COVID-  
 25 19 also causes serious illness, and death in otherwise healthy persons. Rim Decl.  
 26 Exh. K ¶ 6. Even healthy people are at risk of side effects including severe strokes,  
 27 and there is evidence that even asymptomatic individuals can suffer long-term organ  
 28 damage. *Id.* ¶¶ 9, 10.

<sup>148</sup> Like the exhaustion requirement for § 2241, the PLRA’s exhaustion requirement  
 is not jurisdictional and prisoners are not required to specially plead or demonstrate  
 exhaustion in their complaints. *Jones v. Bock*, 549 U.S. 199, 216 (2007).

1 those administrative remedies “as are available.” *Sapp v. Kimbrell*, 623 F.3d 813,  
2 822 (9th Cir. 2010), *superseded by statute on other grounds as stated in Avery v.*  
3 *Paramo*, No. 13-cv-2261 BTM, 2015 WL 4923820, at \*14 (S.D. Cal. Aug. 18,  
4 2015). As explained in detail below, administrative remedies are not available  
5 because ***Terminal Island is not currently allowing access to the grievance process.***

6 The PLRA therefore does not require exhaustion when circumstances render  
7 administrative remedies “effectively unavailable.” *Id.* As the Supreme Court has  
8 explained, the circumstances in which an administrative remedy is unavailable  
9 include “when (despite what regulations or guidance may promise) it operates as a  
10 simple dead end—with officers unable or consistently unwilling to provide any  
11 relief to aggrieved inmates” or “when prison administrators thwart inmates from  
12 taking advantage of a grievance process.” *Ross v. Blake*, 136 S. Ct 1850, 1859–60  
13 (2016). Justice Sotomayor recently addressed the availability of administrative  
14 remedies during the pandemic: “if a plaintiff has established that the prison  
15 grievance procedures at issue are utterly incapable of responding to a rapidly  
16 spreading pandemic like Covid-19, the procedures may be “unavailable . . . much in  
17 the way they would be if prison officials ignored the grievances entirely. . .in these  
18 unprecedented circumstances, where an imminent faces an imminent risk of harm  
19 that the grievance process cannot or does not answer, the PLRA’s textual exception  
20 could open the courthouse doors where they would otherwise stay closed.”  
21 *Valentine v. Collier*, No. 19A1034, --S. Ct. -- (2020), 2020 WL 249751, at \*3 (May  
22 14, 2020) (Mem) (Sotomayor, J.).

23 Here, it is clear that Terminal Island’s grievance procedures are utterly  
24 incapable of responding to the critical health and safety needs of the prisoners in its  
25 care. As Petitioner Wilson explained in a series of letters to his brother, case  
26 managers are not accepting grievance forms.<sup>149</sup> Petitioner Wilson tried to submit

27 \_\_\_\_\_  
28 <sup>149</sup> Rim Decl. Exh. G, Exh B (“They are not even letting us get forms to write the



1 three medical complaints to his case manager without receiving any response.<sup>150</sup>  
 2 And staff have claimed they are too busy with COVID-19 to deal with  
 3 complaints.<sup>151</sup> In short, prison administrators are thwarting prisoners from taking  
 4 advantage of a grievance process such that administrative remedies are “effectively  
 5 unavailable.” As such, exhaustion is not a bar to Petitioners’ direct Eighth  
 6 Amendment challenge to the conditions of confinement at Terminal Island during  
 7 the COVID-19 outbreak.

8 **5. Petitioners’ habeas claims are properly brought under**  
 9 **Section 2241**

10 Based on arguments made by BOP in other similar actions brought against  
 11 different prisons, Petitioners anticipate that Respondents will argue that Petitioners  
 12 are unlikely to succeed on the merits because they cannot seek redress for their  
 13 complaints under Section 2241. As an initial matter, it is important to point out that  
 14 Petitioners bring their claims under two separate procedural vehicles. First, they  
 15 seek either compassionate release or release to home confinement under section  
 16 2241 based on violations of the Eighth Amendment. Second, they seek injunctive  
 17 relief directly under the Eighth Amendment to institute appropriate conditions of  
 18 confinement to prevent the further spread of COVID-19 and to provide  
 19 constitutionally adequate medical care for confirmed COVID-19 cases. Both Ninth  
 20 Circuit law and recent cases from other jurisdictions grappling with these same  
 21 issues make clear that Petitioners claims are brought under the correct statutory  
 22 provisions.

23 \_\_\_\_\_  
 24 staff up”); Exh. E (“They are not responding to any of the cop outs to case  
 25 managers. They are keeping us from the grievance process and will not give us any  
 26 grievance forms.”)

27 <sup>150</sup> Rim Decl. Exh. G ¶ 23

28 <sup>151</sup> Rim Decl. Exh. G ¶ 23

1 Under Ninth Circuit precedent, a habeas corpus petition brought pursuant to  
2 Section 2241 is the proper vehicle for a federal prisoner to challenge “the fact or  
3 duration of his confinement.” *Preiser v. Rodriguez*, 411 U.S. 475, 498–99 (1973).  
4 Put another way, where a prisoner “challenge[s] the manner, location, or conditions  
5 of a sentence’s execution”, it is appropriate to do so pursuant to Section 2241.  
6 *Hernandez v. Campbell*, 204 F.3d 861, 863 (9th Cir. 2000). Courts have already  
7 ordered prisoners released from custody under Section 2241 due to officials’  
8 inability to implement appropriate preventative, diagnostic, and/or treatment  
9 protocols in the face of the COVID-19 pandemic. *See Wilson v. Williams*, No. 4:20-  
10 cv-00794, 2020 WL 1940882, at \*5, 10 (N.D. Ohio Apr. 22, 2020) (concluding that  
11 a similar habeas petition brought by prisoners at FCI Elkton on seeking release on  
12 behalf of a class of medically vulnerable prisoners “ultimately seek[s] to challenge  
13 the fact or duration of confinement,” and is properly brought under section 2241),  
14 *appeal filed* (6th Cir. Apr. 27, 2020); *Wilson v. Williams*, 20-3447, ECF No. 23-1  
15 (6th Cir. May 4, 2020) (denying the Government’s motion to stay, holding that,  
16 “[w]here a petitioner claims no set of conditions would be constitutionally  
17 sufficient, we construe the petitioner’s claim as challenging the fact of the  
18 confinement,” and concluding that the District Court had jurisdiction under §2241);  
19 *Martinez-Brooks*, 2020 WL 2405350, at \*16–17 (concluding that a similar habeas  
20 petition brought by prisoners at FCI Danbury seeking release on behalf of a class of  
21 medically vulnerable prisoners was properly brought under section 2241 because it  
22 challenged “the fact or duration of confinement” by claiming that “no constitutional  
23 conditions of confinement are possible under the circumstances”).

24 As in *Martinez-Brooks* and *Wilson*, Petitioners here contend that the fact of  
25 their confinement in prison itself amounts to an Eighth Amendment violation and  
26 nothing short of an order ending their confinement at Terminal Island will alleviate  
27 that violation. They allege that their medical history, and the medical history of  
28 other medically vulnerable class members and the outbreak at Terminal Island

1 combine to place them in grave danger from COVID-19, that at current facility  
2 population levels, they and other Terminal Island inmates cannot comply with CDC  
3 guidelines for physical distancing. As a result, any other mitigating steps will fail to  
4 meaningfully decrease the risk of contracting COVID-19 at Terminal Island, and,  
5 given the size of the outbreak at Terminal Island, adequate medical care cannot be  
6 given for either COVID-19 or pre-existing conditions. In short, because Petitioners  
7 contends that the Eighth Amendment violation here inheres in their incarceration  
8 and cannot be remedied unless they are removed from that setting, they are  
9 challenging the fact – or existence – of their confinement. And, since this is a habeas  
10 petition challenging the fact or duration of confinement in prison, the PLRA, and its  
11 procedural hurdles, does not apply. 18 U.S.C. § 3636(g)(2); *Naddi v. Hill*, 106 F.3d  
12 275, 277 (9th Cir. 1997) (“Congress was clearly not concerned with habeas corpus  
13 proceedings when they enacted the PLRA . . . .”); *Carmona v. U.S. Bureau of*  
14 *Prisons*, 243 F.3d 629, 634 (2d Cir. 2001) (“[T]he requirements of the [PLRA] do  
15 not apply to habeas proceedings.”); *Harris v. Garner*, 216 F.3d 970, 979 n.7 (11th  
16 Cir. 2000) (“28 U.S.C. § 2241, 2254, and 2255 filings . . . are not covered by the  
17 PLRA.”).<sup>152</sup>

18

19 <sup>152</sup> Petitioners also properly bring their civil rights claims related to their conditions  
20 of confinement directly under the Eighth Amendment. Prisoners may seek  
21 injunctive relief directly under the Eighth Amendment to compel prison officials to  
22 provide adequate medical care and institute measures to prevent the spread of deadly  
23 disease. *See, e.g., Thomas v. U.S.*, 779 F. Supp. 2d 154, 158 (D.D.C. 2011) (finding  
24 that a claim to compel prison officials to provide adequate medical care for  
25 prisoner’s chronic conditions brought directly under the Eighth Amendment is “not  
26 foreclosed”); *Farmer v. Brennan*, 511 U.S. 825, 846 (1994) (“If the court finds the  
27 Eighth Amendment’s subjective and objective requirements satisfied” with regard to  
28 federal prisoner “it may grant appropriate injunctive relief.”); *Corr Servs. Corp. v.*  
*Malesko*, 534 U.S. 61, 74 (2001) (recognizing that a lawsuit for injunctive relief has  
been “long recognized as the proper means for preventing entities from acting  
unconstitutionally”).

1           **C.     Petitioners, the Class and the Subclass Face Irreparable Harm if**  
 2           **They Continue to Be Incarcerated and If Unsafe Conditions are**  
 3           **Allowed to Persist At Terminal Island**

4           Petitioners and the Class face a substantial risk that they may contract  
 5 COVID-19, and suffer from serious illness and/or death. For Petitioners and Class  
 6 members that have contracted COVID-19, they are at risk of needlessly suffering  
 7 more serious, long-lasting consequence or even death due to inadequate care if the  
 8 relief sought is not granted.

9           A plaintiff who seeks a TRO must demonstrate that he is likely to suffer  
 10 irreparable harm in the absence of a TRO. *See Winter*, 555 U.S. at 20.<sup>153</sup> To  
 11 establish irreparable harm, a plaintiff must demonstrate that “remedies available at  
 12 law, such as monetary damages, are inadequate to compensate” for the injury. *Herb*  
 13 *Reed Enters., LLC v. Fla. Entm't Mgmt.*, 736 F.3d 1239, 1249 (9th Cir. 2013). “It is  
 14 well established that the deprivation of constitutional rights ‘unquestionably  
 15 constitutes irreparable injury.’” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir.  
 16 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

17           A likelihood of irreparable harm is clearly present here. Petitioners and other  
 18 Terminal Island prisoners face severe illness, pain, and potentially death if the TRO  
 19 is not granted. There is already an extreme outbreak of COVID-19 at Terminal  
 20 Island and eight lives have been lost. Petitioners and the other inmates, many of  
 21 whom are medically vulnerable, are at serious risk of grave or life-threatening  
 22 complications due to the overcrowding, inability to socially distance, lack of  
 23

24 \_\_\_\_\_  
 25 <sup>153</sup> The plaintiff “need not further show that the action sought to be enjoined is the  
 26 exclusive cause of the injury.” *M.R. Dreyfus*, 697 F.3d 706, 728–29 (9th Cir. 2004)  
 27 (finding that a challenged regulation that increases risk of institutionalization  
 28 inflicts cognizable irreparable injury for purposes of a preliminary injunction where  
 the regulation “exacerbate[s] that risk” even though “that risk is not exclusively  
 attributable to the challenged regulation”).

1 adequate PPE and disinfectant solution and the inadequate, indifferent medical care.

2 It is axiomatic that a substantial risk of serious illness or death, such as that  
3 posed here, constitutes irreparable harm. “The Constitution protects those in  
4 detention against a condition of confinement that is sure or very likely to cause  
5 serious illness and needless suffering the next week or month or year.” *Fraihat*,  
6 2020 WL 1932570 (C.D. Cal., April 20, 2020) (internal citations and quotations  
7 omitted); *see also Helling*, 509 U.S. at 33 (1993) (“It would be odd to deny an  
8 injunction to inmates who plainly proved an unsafe, life-threatening condition in  
9 their prison on the ground that nothing yet had happened to them.”); *Harris v. Bd. of*  
10 *Supervisors, Los Angeles Cty.*, 366 F.3d 754, 766 (9th Cir. 2004) (finding likelihood  
11 of “pain, infection, amputation, medical complications, and death” constituted  
12 irreparable harm).<sup>154</sup>

13 For this reason, courts around the country, including the Central District of  
14 California have concluded that incarcerated individuals “established they will suffer  
15 the irreparable harm of increased likelihood of severe illness and death” from  
16 COVID-19 “if a [TRO or] preliminary injunction is not entered.” *Fraihat*, 2020 WL  
17 1932570, at \*27 (Bernal, J.); *see also Castillo v. Barr*, --- F. Supp. 3d ---, 2020 WL  
18 1502864, at \*1 (C.D. Cal. Mar. 27, 2020) (Hatter, J.) (granting TRO and finding that  
19 the immigration detainee petitioners established that they are likely to suffer  
20

21 <sup>154</sup> Indeed, irreparable harm can be established by showing a substantial likelihood  
22 of emotional or psychological injury. *Chalk v. U.S. Dist. Court Cent. Dist. of*  
23 *California*, 840 F.2d 701, 709-10 (9th Cir. 1988) (finding that emotional and  
24 psychological injury cannot be adequately compensated for by a monetary award  
25 and therefore constitutes irreparable injury); *Edmo v. Corizon, Inc.*, 935 F.3d 757,  
26 797-98 (9th Cir. 2019) (irreparable harm existed with respect to denial of treatment  
27 for inmates gender dysphoria due to “ongoing psychological distress and the high  
28 risk of self-castration and suicide she faces absent surgery.”); *Inland Empire-*  
*Immigrant Youth Collective v. Nielsen*, No. EDCV 17-2048 PSG (SHKx), 2018 WL  
1061408, at \*20 (C.D. Cal. February 26, 2018) (finding that loss of DACA causes  
emotional pain, which is a cognizable form of irreparable injury).

1 irreparable harm due to the risk of contracting COVID-19 when they are not kept six  
2 feet apart from other detainees); *Kaur v. U.S. Dep't of Homeland Security*, No. 2:20-  
3 cv-03172, 2020 WL 1939386, at \*3 (C.D. Cal. April 22, 2020) (Wright, J.) (finding  
4 that “the risk posed in immigration detention facilities of contracting and dying from  
5 [COVID-19] is so severe that it constitutes an irreparable harm supporting a TRO”);  
6 *Doe v. Barr*, No. 20-CV-02141-LB, 2020 WL 1820667, at \*1, 9 (N.D. Cal. April 12,  
7 2020) (granting TRO for “immediate release” of Section 2241 petitioner in ICE  
8 custody because detainees at the facility where he was housed “live in close  
9 quarters, cannot practice social distancing, do not have masks, and do not have  
10 access to adequate disinfecting and cleaning supplies”); *Bent v. Barr*, No. 19-CV-  
11 06123, 2020 WL 1812850, at \*1–2 (N.D. Cal. Apr. 9, 2020) (granting TRO for  
12 release of Section 2241 petitioner, who alleged failure to adequately protect him  
13 from COVID-19 “due to overcrowding and lack of adequate cleaning supplies”);  
14 *Wilson v. Williams*, No. 20-3447, ECF No. 23, at \*3 (6th Cir. May 4, 2020)  
15 (ordering release of inmates where they “claim[ed] no set of conditions would be  
16 constitutionally sufficient” during the COVID-19 pandemic, which “challeng[ed]  
17 the fact of the confinement”); *Coronel v. Decker*, --- F. Supp. 3d ---, 2020 WL  
18 1487274, at \*10 (S.D.N.Y. Mar. 27, 2020) (issuing TRO for “immediate[] release”  
19 of Section 2241 Petitioners asserting a deliberate indifference medical treatment  
20 claim); *Jovel v. Decker*, No. 20-CV-308 (GBD), 2020 WL 1467397, at \*1–2  
21 (S.D.N.Y. Mar. 26, 2020) (due to COVID-19, releasing Section 2241 petitioner  
22 during pendency of removal proceedings); *Thakker v. Doll*, No. 20-CV-0480, 2020  
23 WL 1671563, at \*9 (M.D. Pa. Mar. 31, 2020) (issuing TRO and ordering facilities to  
24 “immediately” release, on their own recognizance, habeas Petitioners who “suffer[]  
25 from chronic medical conditions and face[] an imminent risk of death or serious  
26 injury if exposed to COVID-19”); *cf. Xochihua-Jaimes v. Barr*, 798 F. App'x 52  
27 (Mem) (9th Cir. Mar. 24, 2020) (*sua sponte* ordering release of immigration  
28 detainee during pendency of appeal); *United States v. Brady*, No. 20-CV-623, 2020

1 WL 1865486, at \*1–3 (M.D. Pa. Apr. 14, 2020) (court *sua sponte* construed motion  
2 for immediate release to home confinement as a habeas petition under Section 2241  
3 and transferred matter to jurisdiction where petitioner was incarcerated).

4 **D. It Is in the Public Interest to Release Appropriate Prisoners to**  
5 **Home Confinement and Institute Other Measures to Prevent the**  
6 **Spread of COVID-19**

7 Where the government is the opposing party, balancing of the harm and the  
8 public interest merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, the  
9 balance of equities and public interest sharply incline in Petitioners' favor. "[I]t is  
10 always in the public interest to prevent the violation of a party's constitutional  
11 rights." *Melendres v Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation  
12 omitted). That is especially true here, where the constitutional rights at stake go the  
13 physical well-being of the Petitioners. Moreover, there can be no public interest in  
14 exposing vulnerable persons to increased risks of severe illness and death. "Faced  
15 with such a conflict between financial concerns and preventable human suffering,  
16 we have little difficulty concluding that the balance of hardships tips decidedly in  
17 plaintiffs' favor." *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (quoting  
18 *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983)).

19 Numerous courts have already found a significant public interest in releasing  
20 ill and medically vulnerable prisoners and detainees during the COVID-19  
21 pandemic. *See e.g. Bent*, 2020 WL 1812850, at \*7 (finding it was in the public  
22 interest to release detainee with prior violent felony conviction to prevent spread of  
23 COVID-19); *Castillo v. Barr*, No. 20-00605 TJH (AFMx), 2020 WL 1502864, at \*6  
24 (C.D. Cal, March 27, 2020) (ordering release of detainee and finding that "[t]he  
25 public has a critical interest in preventing the further spread of the coronavirus.");  
26 *Martinez-Brooks*, 2020 WL 2405350, at \*28 (finding it was in the public interest to  
27 release to home confinement medically vulnerable prisoners at FCI Danbury);  
28 *Wilson*, 2020 WL 1940882, at \*9–10 (finding that it was in the public interest to

1 release to home confinement medically vulnerable prisoners at FCI Elkton).

2       The relief requested here – release of appropriate inmates to home  
3 confinement (to be identified through a structured, court-supervised individualized  
4 determination), and institution of appropriate precautionary measures and  
5 constitutionally adequate medical care at the prison would protect the staff at  
6 Terminal Island as well as the community at large. That is true even for patients who  
7 have tested positive for COVID-19. Releasing COVID-19 positive medically  
8 vulnerable prisoners to home confinement reduces the risk that local hospitals will  
9 be overwhelmed by people who are more likely to need the most substantial care,  
10 leaving more resources to treat the community.<sup>155</sup> It would also reduce staff  
11 interaction with COVID-19 positive prisoners, which is in the public interest  
12 because staff members who come into contact with COVID-19-positive prisoner  
13 may spread the disease to other prisoners as well as their families and  
14 communities.<sup>156</sup> Release of prisoners to home confinement also helps protect the  
15 prisoners who remain at Terminal Island by reducing the population density in the  
16 prison, which will finally allow the implementation of physical distancing measures.  
17 Importantly, according to Dr. Samra, reducing the prison population effectively

18  
19 \_\_\_\_\_  
20 <sup>155</sup> There is little risk to the community in releasing such prisoners given that  
21 Terminal Island is a low security prison and all prisoners will have to have an  
22 appropriate home release plan. *See United States v. Arreola-Bretado*, --F.Supp.3d--,  
23 2020 WL 2535049, at \*3 (S.D. Cal. May 15, 2020) (“The Government argues that  
24 Ms. Arreola-Bretado is dangerous for the sole reason that she is COVID-19-  
25 positive. But with appropriate medical care, she will not be a harm to others.  
Returning to her family to quarantine is safer for the community than is keeping Ms.  
Arreola-Bretado confined to Otay Mesa where she will likely be a risk to other  
inmates and staff who have not yet contracted COVID-19.”).

26 <sup>156</sup> Sandhya Kajeepeta & Seth J. Prins, *Why Coronavirus in Jails Should Concern*  
27 *All of Us*, THE APPEAL (Mar. 24, 2020), <https://theappeal.org/coronavirus-jails-public-health/>.  
28



1 reduces the number of people inside who will become ill enough to require outside  
 2 hospitalization, which also reduces the strain on community hospital resources and  
 3 decreases chances of sick prisoners coming into contact with other members of the  
 4 general public.<sup>157</sup> Accordingly, the relief Petitioners seek can slow or stop the  
 5 spread of infection (or re-infection) and ensure appropriate and proactive treatment  
 6 of infected prisoners, to the benefit of prisoners and staff and, ultimately, *the*  
 7 *community at large*.<sup>158</sup> Given that Petitioners here are requesting a structured,  
 8 court-supervised process for individualized consideration of each prisoner’s  
 9 suitability for release to home confinement, releasing even prisoners who have  
 10 tested positive for the virus will not put the public in harm’s way. As part of this  
 11 structured process, Petitioners specifically request that Respondents provide each  
 12 prisoner with an opportunity to present an appropriate home release plan. Each of  
 13 the Petitioners has such a plan already in place. Each of the named Petitioners plans  
 14 to live, *and self-quarantine*, at the home of a relative, where they will have access to  
 15 doctors familiar with conditions and medical history. Petitioner Wilson plans to live  
 16 with his father, Petitioner Smith with his wife, and Petitioner Vasquez with his  
 17 sister.

18 The requested actions – which will help prevent burdening hospitals and  
 19 healthcare systems, and allow our communities to safely reopen sooner – are  
 20 undeniably in the public interest.

21 **E. This Court Has the Power to Grant a TRO and Issue a Provisional**  
 22 **Order of Enlargement of Custody While This Habeas Action is**  
 23 **Pending.**

24 In light of the emergency nature of Petitioners’ circumstances and the  
 25 substantial health and safety issues raised by their petition, they request that the

26 \_\_\_\_\_  
 27 <sup>157</sup> Rim Decl. Exh. K ¶ 22.

28 <sup>158</sup> *Id.* at ¶ 24 (emphasis added.)

1 Court act immediately to safeguard their well-being and the well-being of the other  
2 prisoners at Terminal Island and enter an Order enlarging their custody to place  
3 them and other appropriate members of the Class on home confinement during the  
4 pendency of this habeas action.

5 Federal district courts have authority, when habeas actions are pending, to  
6 “enlarge” the custody of petitioners. Enlargement is not release. Rather, it is a  
7 provisional remedy that modifies custody by expanding the site at which it takes  
8 place. *That is, the petitioner remains in custody, but the place of custody is*  
9 *changed, or “enlarged,” upon order of the court, from a particular prison to a*  
10 *hospital, halfway house, a person’s home, or another setting.* See Declaration of  
11 Professor Judith Resnik Regarding Enlargement and the Use of Provisional  
12 Remedies for Detained Individuals (“Resnik Dec.”) ¶¶ 29-30; *see also Wilson*, 2020  
13 WL 1940882, \*4 (describing the authority of the district court to grant enlargement  
14 pending a ruling on the merits of a habeas petition, noting that “[w]hen a court  
15 exercises its power to ‘enlarge’ the custody of a defendant pending the outcome of a  
16 habeas action, the BOP maintains custody over the defendant, but the place of  
17 custody is altered by the court”); *Martinez-Brooks*, 2020 WL 2405350, at \*14 (in  
18 Section 2241 petition based on COVID-19, granting TRO seeking “enlargement to  
19 home confinement” where prisoners “would remain within the custody of BOP”).

20 Enlargement is part and parcel of Congress’s authorization for federal judges  
21 under the habeas statutes to “summarily hear and determine the facts, and dispose of  
22 the matter as law and justice require.” *See* 28 U.S.C. § 2243. The Ninth Circuit has  
23 explicitly recognized the power of district courts to grant release pending a habeas  
24 decision where there are “special circumstances” and “a high probability of  
25 success.” *See Land v. Deeds*, 878 F.2d 318, 318 (9th Cir. 1989); *see also Hall v.*  
26 *Superior Court*, 2020 WL 890044, at \*2–3 (N.D. Cal. March 8, 2010) (holding that  
27 a district court can grant bail to state prisoners pending a habeas decision if the  
28

1 prisoner shows “exceptional circumstances” and a “high probability of success.”<sup>159</sup>

2 Applying this standard, at least two courts have granted enlargement to  
 3 classes of prisoners pending final adjudication of their habeas petitions based on the  
 4 risks presented by the COVID-19 crisis. *Wilson*, 2020 WL 1940882; *Martinez-*  
 5 *Brooks v. Easter*, 2020 WL 2405350. In granting enlargement the *Martinez-Brooks*  
 6 courts put in place a structured, supervised process for BOP to determine which  
 7 prisoners could appropriately be released to home confinement in order to decrease  
 8 the density of the prisons to the degree of safety necessary to prevent the spread of  
 9 COVID-19. In particular, the court required on an explicit timeframe:

- 10 • The identification of all medically vulnerable prisoners;
- 11 • Implementation of a process that makes full and speedy use of the  
 12 home confinement authority under 18 U.S.C. § 3624(b) and the  
 13 CARES Act by (a) prioritizing for review for home confinement all  
 14 inmates identified on the list, (b) assigning substantial weight in that  
 15 review to the inmate’s risk factors for COVID-19 based on CDC  
 16 guidance, (c) eliminating all requirements that the inmate have served  
 17 some portion of his or her sentence to be eligible for placement on  
 18 home confinement, (d) eliminating the requirement that a “primary or  
 19 prior offense” not be a violent offense; (e) eliminating the requirement  
 20 that the inmate be “without incident reports in the past 12 months  
 21 (regardless of severity level)”; (f) modifying any requirement that a  
 person approved for home confinement be quarantined at the facility  
 for 14 days to allow for immediate release to home confinement for  
 those inmates as to whom Respondent verifies, after reasonable inquiry,  
 that the inmate is not showing symptoms and is able to self-isolate for  
 the same period in the home confinement setting;
- Provision of written notice of (a) either a referral of the matter in  
 writing with recommendation of approval of the request or (b) denial of  
 the request, together with the appropriate appeal form to each inmate  
 identified who had made a written request for compassionate relief

22 \_\_\_\_\_  
 23 <sup>159</sup> Other circuits that have considered this issue have likewise concluded that a  
 24 provisional remedy of enlargement (or bail) pending a decision on a habeas petition  
 25 is appropriate. *See, e.g., Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir.2001); *Landano v.*  
 26 *Rafferty*, 970 F.2d 1230, 1239 (3d Cir. 1992); *Martin v. Solem*, 801 F.2d 324, 329  
 27 (8th Cir. 1986); *Woodcock v. Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972); *Calley v.*  
 28 *Callaway*, 496 F.2d 701, 702 (5th Cir.1974); *Dotson v. Clark*, 900 F.2d 77, 79 (6th  
 Cir. 1990); *Cherek v. United States*, 767 F.2d 335, 337 (7th Cir.1985); *Pfaff v.*  
*Wells*, 648 F.2d 689, 693 (10th Cir. 1981); *Baker v. Sard*, 420 F.2d 1342, 1343–44  
 (D.C. Cir. 1969).

- 1 based on COVID-19 but has not yet received a decision;
- 2 • Implement a process by which inmates who make a request for  
3 compassionate release based on COVID-19 receive notice of either  
4 referral or denial within 7 days
  - 5 • File a statement on the docket explaining whether and how the criteria  
6 in the BOP’s Program Statement governing compassionate release have  
7 been updated to take account of the COVID-19 crisis
  - 8 • Complete review of the home confinement process and approve or  
9 deny such person home confinement;
  - 10 • Provide to the Court an individualized explanation of each denial of  
11 home confinement as to an inmate identified pursuant to the home  
12 confinement process implemented by the Court, including at least a  
13 brief description of the factual basis for any factors deemed to outweigh  
14 the danger to the inmate from COVID-19.

15 *Martinez-Brooks*, 2020 WL 2405350, at \*32–34.

16 This individualized, supervised process-based remedy left decision making in  
17 the hands of BOP, while ensuring that BOP makes timely decisions based on  
18 appropriate considerations in light of the nature of the threat from COVID-19.  
19 Petitioners here request a similar, process-based remedy in order to preserve  
20 Petitioners’ current state of health and wellbeing and to make the remedy of release  
21 effective if they prevail in this action. Petitioners have articulated the specific relief  
22 requested in a concurrently filed Proposed Order. Petitioners have demonstrated  
23 “extraordinary circumstances” and shown a “high probability of success” supporting  
24 enlargement relief in light of the rampant spread of COVID-19 at Terminal Island,  
25 the particular threat to their health, and Respondents’ failure to ensure necessary  
26 social distancing, effective quarantine and isolation procedures, adequate sanitation  
27 and adequate medical care. Enlargement pursuant to a supervised process is, thus,  
28 both appropriate and necessary here.

#### 29 **IV. CONCLUSION**

30 For the foregoing reasons, Petitioners respectfully request that Court grant the  
31 Temporary Restraining Order and impose a structured, court-supervised process for  
32 individualized consideration of each prisoner’s suitability for release on an

1 accelerated schedule that focuses on the critical factors of prisoner and public safety  
2 currently ignored by the current home confinement review process at Terminal  
3 Island. Petitioners further request that the Court require Respondents to adhere to  
4 CDC guidance regarding the prevention and treatment of COVID-19.

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6 DATED: May 22, 2020  
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Respectfully submitted,  
Bird, Marella, Boxer, Wolpert, Nessim,  
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By:           /s/ Naeun Rim            
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DATED: May 22, 2020  
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DATED: May 22, 2020  
Donald Specter  
Sara Norman  
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By:           /s/ Donald Specter            
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**CERTIFICATE OF AUTHORIZATION**  
**TO SIGN ELECTRONIC SIGNATURE**

Pursuant to Local Rule 5-4.3.4(a)(2)(i) of the Signatures Procedures for the United States District Court for the Central District of California, filer attests that all other signatories listed concur in the filing’s content and have authorized this filing.

DATED: May 22, 2020

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18 **UNITED STATES DISTRICT COURT**

19 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

20 LANCE AARON WILSON;  
 21 MAURICE SMITH; EDGAR  
 VASQUEZ, individually and on behalf  
 22 of all others similarly situated,

23 Plaintiff-Petitioners,

24 vs.

25 FELICIA L. PONCE, in her capacity as  
 Warden of Terminal Island; and  
 26 MICHAEL CARVAJAL, in his  
 capacity as Director of the Bureau of  
 27 Prisons,

28 Defendant-Respondents.

CASE NO. 2:20-cv-04451-DDP-MRW

**DECLARATION OF JIMMY  
 THREATT IN SUPPORT OF  
 PLAINTIFFS' EX PARTE  
 APPLICATION FOR TEMPORARY  
 RESTRAINING ORDER AND  
 ORDER TO SHOW CAUSE RE:  
 PRELIMINARY INJUNCTION**

Assigned to Hon. Dean D. Pregerson  
Courtroom 9C





1           4.     On May 19, 2020 (after the Complaint was filed), I had a legal call with  
2 Maurice Smith, during which he relayed the following information:

- 3           •     Maurice Smith is 50 years old. He is pre-diabetic, suffers from  
4           hypertension, and also has kidney and liver disease. He receives  
5           medication for his high blood pressure. He has been incarcerated  
6           at Terminal Island since April 2019. At a prior facility, he  
7           received regular consultations (every 6 months) with a  
8           nephrologist for kidney disease. Since arriving at Terminal  
9           Island, he has only had one such appointment even scheduled;  
10          however, officials failed to process his blood work prior to the  
11          appointment so it was cancelled. That appointment has not been  
12          rescheduled. He has yet to see a nephrologist.
- 13          •     Officials at Terminal Island did not check prisoners'  
14          temperatures until after the first prisoner died. Since that time,  
15          they have checked temperatures, but they do not monitor  
16          prisoners' symptoms.
- 17          •     Mr. Smith has been given only two masks in total since the  
18          pandemic began. They are laundered once a week.
- 19          •     Mr. Smith resides in B Unit, an open dormitory consisting of  
20          approximately 60 inmates, who share four toilets, four sinks, and  
21          three showers. There is approximately four feet of space  
22          between the bunks where inmates sleep.
- 23          •     Prison officials moved Mr. Smith to a warehouse with other  
24          inmates from B Unit, approximately half of them. The  
25          warehouse was overrun with pigeons, who defecated on bunks,  
26          mice scurried across the floor, and a roof leak had caused scores  
27          of mosquitoes to gather. There also was no heating. After his  
28          first night there, Mr. Smith met with the Associate Warden, who  
            agreed to transfer him back to B Unit, so long as he didn't tell  
            the other prisoners who were now at the warehouse. They were  
            instead told that Mr. Smith was being sent to the hole.
- Mr. Smith was tested for COVID-19, but he was not given the  
            results of his test. However, he believes he is positive because  
            he has experienced severe symptoms, including body aches,  
            fatigue, chills, and dizziness. His symptoms, he said, have been  
            "fifty times worse than the flu." When he has complained to  
            corrections officers, they said they couldn't do anything unless  
            his fever reached 101 degrees and remained there for an  
            extended period. He was not permitted access to a doctor.
- Mr. Smith has also seen other prisoners with severe symptoms  
            who did not receive any treatment, because prison officials  
            would only intervene if their fevers reached 101 degrees or  
            higher and remained at or above that threshold for an extended  
            period.

1           5.     On May 19, 2020, I had a legal call with William Sutton, Jr., during  
2 which he relayed the following information:

- 3           •     William Sutton is 50 years old and has been tested twice for  
4           COVID-19, with both tests coming back negative. The first test  
5           occurred in mid or late April and the second was about a week  
6           later. He has not experienced any of the typical symptoms  
7           associated with COVID-19.
- 8           •     At the beginning of the pandemic, Mr. Sutton lived in A Unit,  
9           which is a dormitory containing 73 prisoners, two urinals, and  
10          four toilets.
- 11          •     In late April he was transferred to J Unit, which is a tier of cells,  
12          approximately 150 prisoners in all, and an attached annex that  
13          Mr. Sutton cannot access. He has been told that J Unit is for  
14          prisoners who have tested negative. However, after he had been  
15          in J Unit for about a week, prison officials transferred 64  
16          prisoners to other units. They had tested positive on the second  
17          wave of testing, when Mr. Sutton received his second negative  
18          test result.
- 19          •     Furthermore, prison officials regularly (about 2 or 3 times a  
20          week) transfer large groups (sometimes as many as 20) prisoners  
21          in and out of J Unit. The reason for such transfers is not clear to  
22          Mr. Sutton.

23           6.     On May 20, 2020, I had a legal call with Edgar Vasquez, during which  
24 he relayed the following information:

- 25          •     Edgar Vasquez is 32 years old and has not tested positive for  
26          COVID-19. He previously suffered a broken nose that affects  
27          his ability to breathe. Staff at Terminal Island have refused to  
28          treat the condition and instead have told him to purchase pain  
29          medication from the commissary.
- 30          •     When the pandemic began he lived in B Unit, where about 60  
31          prisoners live in an open dormitory, with two prisoners to a bunk  
32          bed and the bunks separated only by about two feet.
- 33          •     In mid-April he was transferred to a former UNICOR warehouse.  
34          It was overrun by bats, pigeons, and roaches the size of rats.  
35          There was no heating, leaving all 60 prisoners to shiver through  
36          the night on hastily prepared fold-out beds that were only two  
37          feet apart from one another. All 60 prisoners shared a single  
38          bathroom containing one toilet, two urinals, and three showers.
- 39          •     While at the warehouse, Mr. Vasquez saw four of five prisoners  
40          who became severely ill. It was very difficult for them get  
41          treatment of any kind, unless they were essentially on the floor  
42          and unable to get up or move on their own. After refusing to  
43          provide help, corrections officers eventually took them out of the  
44          warehouse. Mr. Vasquez does not know what happened to those

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prisoners because they had not returned by the time he was transferred out.

- After about a week at the warehouse, Mr. Vasquez was transferred to the annex of J Unit, which is an open dorm containing about 60 prisoners. Prisoners sleep on bunk beds, two to a bunk, with each bunk bed separated by about 2 feet. They have access to two toilets, two urinals, and three showers. He has a bunkmate in the J Unit Annex.
- Mr. Vasquez has been tested for COVID-19 three times: (1) shortly after arriving at the warehouse in the middle of April; (2) immediately before transferring from the warehouse to the J Unit Annex; and (3) and again around May 10.
- Mr. Vasquez’s understanding is that every prisoner in the J Unit Annex is supposed to be negative. However, officials regularly transfer out prisoners who have tested positive and transfer in prisoners who are purportedly negative. This occurs every three or four days.
- Since late April, prison officials have been regularly checking prisoners’ temperatures, but the devices they use often malfunction or don’t have batteries.
- Mr. Vasquez is forced to reuse masks he has been given by prison officials. He washes them in the shower.
- There has not been professional cleaning of the J Unit Annex since the pandemic began. Instead, prisoners are given watered-down cleaning chemicals and use old rags to sanitize common and personal areas.
- The bathrooms in the J Unit Annex are especially unsanitary. Because Terminal Island is a Level Three Care Facility, many inmates are older or ill and have sometimes have difficulty using the bathroom. As a result, Mr. Vasquez tries to clean the bathroom on his own every time before he uses it, with the limited cleaning supplies provided by prison staff.
- Prisoners are not given hand sanitizer.
- Mr. Vasquez interacts with three or four corrections officers every day. Not all of them wear masks.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I executed this declaration on May 21, 2020, at Los Angeles, California.

*/s/ Jimmy Threatt*  
Jimmy Threatt